(21,539.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 377.

CHICAGO GREAT WESTERN RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF MINNESOTA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

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a STATE OF MINNESOTA,
Supreme Court:

STATE OF MINNESOTA, Appellant,
vs.
CHICAGO GREAT WESTERN RAILWAY COMPANY, Defendant.

Respondent's Petition for a Writ of Error.

To the Honorable Charles M. Start, Chief Justice of the Supreme Court of the State of Minnesota:

The Petition of the Chicago Great Western Railway Company respectfully represents that it is a corporation duly organized and existing under the laws of the States of Illinois, Iowa and Minnesota, that on or about the 22nd day of January, 1909, there was entered in and by the Supreme Court of the State of Minnesota, the same being the highest court of said State, a final judgment in a case therein pending between the State of Minnesota, Appellant, and Plaintiff in the District Court, and said Chicago Great Western Railway Company, Respondent in said Supreme Court, and Defendant in said District Court; said judgment being in favor of the Appellant;

That in said judgment of said Supreme Court of the State of Minnesota, and in the proceedings had prior thereto in said cause, certain errors were committed to the prejudice of this defendant, as appears from the assignments or error herewith submitted and filed, and from the certified transcript of the record in said
b cause herewith submitted;

That in said cause the validity of a statute of the State of Minnesota was drawn in question on the ground of its being repugnant to the Constitution of the United States, and the decision was in favor of its validity;

Therefore, This Petitioner prays that a writ of error may issue in this behalf to the said Supreme Court of the State of Minnesota for the correction of the errors so complained of; and that a transcript of the record in this cause duly authenticated may be sent to the Supreme Court of the United States.

DAVIS, KELLOGG & SEVERANCE,
Attorneys for Respondent,
Merchants Nat'l Bank Bldg.,
St. Paul, Minnesota.

15991.
Original.
Dated this 18th day of February, 1909.

(Endorsements:) State of Minnesota vs. C. G. W. Ry. Company. Respondent's Petition for Writ of Error. Filed February 18, 1909. C. A. Pidgeon, Clerk.

c STATE OF MINNESOTA,
Supreme Court:

STATE OF MINNESOTA, Appellant,
vs.
CHICAGO GREAT WESTERN RAILWAY COMPANY, Respondent.

Order Allowing Writ of Error.

The respondent in the above entitled action having this day appeared before me, and having presented its petition for a writ of error from the Supreme Court of the United States to this court and its assignments of error; and further, having submitted a good and sufficient undertaking that said respondent shall prosecute its writ to effect and answer all damages and costs if it fail to make its plea good;

It is hereby ordered That a writ of error be, and the same is hereby allowed from said Supreme Court of the United States to the Supreme Court of the State of Minnesota, in the above entitled cause; good and sufficient security having been provided as required by law.

CHARLES M. START,
Chief Justice of the Supreme Court of the State of Minnesota.

Dated this 18th day of February, 1909.
15991.

(Endorsements:) Supreme Court of State of Minnesota. State of Minnesota, Appellant, vs. C. G. W. Ry. Co., Respondent. Order allowing Writ of Error. Filed February 18, 1909. C. A. Pidgeon, Clerk.

d STATE OF MINNESOTA,
Supreme Court, ss:

I, C. A. Pidgeon, Clerk of said Supreme Court, do hereby certify that the foregoing is a full and true copy of the Petition for Writ of Error and order allowing same in the cause therein entitled, as appears from the original, remaining on file in my office; that I have carefully compared the within copy with said original, and that the same is a correct transcript therefrom, and of the whole thereof.

Witness my hand and seal of said Supreme Court at the Capitol, in the city of St. Paul, this 25th day of February, A. D., 1909.

[Seal of the Supreme Court, State of Minnesota.]

C. A. PIDGEON, *Clerk.*

e UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Minnesota, Greeting:

Because in the record and the proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Minnesota before you, or some of you, being the highest court of the said State in which a decision could be had in the said suit between the State of Minnesota, Plaintiff and Appellant in the said Supreme Court of Minnesota, and Chicago Great Western Railway Company, Defendant and Respondent in said Supreme Court, wherein was drawn in question the validity of a statute of the State of Minnesota, on the ground of its being repugnant to the Constitution of the United States, and the decision was in favor of its validity, a manifest error hath happened to the great damage of the said Chicago Great Western Railway Company, as by its complaint appears;

We being willing that the error, if any hath been, shall be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 18 day of March next; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice
f of the Supreme Court of the United States, the 18th day of February in the year of our Lord one thousand nine hundred and nine.

[Seal U. S. Circuit Court, Dist. of Minnesota, Third Division.]

HENRY D. LANG,
Clerk of the United States Circuit Court
for the District of Minnesota,
By LOUIS E. B. TROTT, *Deputy.*

Allowed by:
CHAS. M. START,
Chief Justice of the Supreme Court of the State of Minnesota.

[Endorsed:] Original. Supreme Court of United States.
g C. G. W. Ry. Company, Plaintiff in Error, vs. State of Minnesota, Defendant in Error. Writ of Error. Filed Feb. 18, 1909. C. A. Pidgeon, Clerk.

h Supreme Court of the United States.

CHICAGO GREAT WESTERN RAILWAY COMPANY, Plaintiff in Error,
vs.
STATE OF MINNESOTA, Defendant in Error.

The Supreme Court of the United States to the State of Minnesota, Greeting:

You are hereby cited and admonished to be and appear at a session of the Supreme Court of the United States, to be holden at the City of Washington on the 18th day of March next, pursuant to a writ of error filed with the Clerk of the Supreme Court of the State of Minnesota, wherein the Chicago Great Western Railway Company is Plaintiff in Error, and you are Defendant in Error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error set forth should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, this 18th day of February, in the year of our Lord One Thousand Nine Hundred and Nine.

CHAS. M. START,
Chief Justice Supreme
Court of Minnesota.

i [Endorsed:] 15991. Original. Supreme Court of the United States. C. G. W. Ry. Co. vs. State of Minnesota. Citation. Due service of the within Citation by delivery of a copy thereof at St. Paul, Minnesota, this 18th day of Feb., 1909, is hereby admitted. Geo. T. Simpson, Att'y General. Filed Feb. 18, 1909. C. A. Pidgeon, Clerk.

j STATE OF MINNESOTA.
Supreme Court:

STATE OF MINNESOTA, Appellant,
vs.
CHICAGO GREAT WESTERN RAILWAY COMPANY, Respondent.

Undertaking on Writ of Error.

Whereas, The Respondent in the above entitled action proposes to prosecute a writ of error to the Supreme Court of the State of Minnesota, and to review the proceedings therein in the Supreme Court of the United States;

Now therefore, We, *American Bonding Company of Baltimore*, do undertake, promise and agree to and with the State of Minnesota, the appellant above named, that said respondent, Chicago Great Western Railway Company, shall prosecute its writ of error to effect and answer all damages and costs, together with interest if it

fail to make good its plea; conditioned, however, that our liability hereunder shall not exceed the sum of $2,000.00.

AMERICAN BONDING COMPANY OF BALTIMORE.
By FITZHUGH BURNS, *Vice-Pres't.*

Attest: R. M. SMITH, *Ass't Sec'y.*

Dated this 16th day of February, 1909.

STATE OF MINNESOTA,
County of Ramsey, ss:

On this *16th* day of February, 1909, before me, a Notary Public within and for said County, personally appeared *Fitzhugh Burns* and *R. M. Smith* to me personally known, who being each by me duly sworn, did say that they are respectively the Vice-President and the Assistant Secretary of the American Bonding Company of Baltimore, the corporation named in the foregoing instrument, and the seal affixed to said instrument, is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors and said *Fitzhugh Burns* and *R. M. Smith*, acknowledged said instrument to be the free act and deed of said corporation.

E. C. BLASIUS,
Notary Public, Ramsey County, Minnesota.

My commission expires Mar. 20, 1914.

k Within Undertaking approved but it is not to operate as a supersedeas.

Dated February 18th, 1909.

CHAS. M. START,
Chief Justice of the Supreme Court of the State of Minnesota.

(Endorsements:) 15991. *Original:* Supreme Court of Minnesota. State of Minnesota, Appellant, vs. C. G. W. Ry. Co., Respondent. Undertaking on Writ of Error. Filed February 18, 1909. C. A. Pidgeon, Clerk.

l STATE OF MINNESOTA,
Supreme Court, ss:

I, C. A. Pidgeon, Clerk of said Supreme Court, do hereby certify that the foregoing is a full and true copy of the undertaking of writ of error and approval of the same in the cause therein entitled, as appears from the original, remaining on file in my office; that I have carefully compared the within copy with said original, and that the same is a correct transcript therefrom, and of the whole thereof.

Witness my hand and seal of said Supreme Court at the Capitol, in the city of St. Paul, this 25th day of February A. D. 1909.

[Seal of the Supreme Court, State of Minnesota.]

C. A. PIDGEON, *Clerk.*

m STATE OF MINNESOTA,
Supreme Court:

STATE OF MINNESOTA, Appellant,
vs.
CHICAGO GREAT WESTERN RAILWAY COMPANY, Respondent.

Assignments of Error.

The respondent in this action in the Supreme Court of the State of Minnesota, in connection with its petition for a writ of error from the Supreme Court of the United States to said Supreme Court of the State of Minnesota, makes the following assignments of error, which it avers occurred upon the hearing of said cause in this court, and in the rendition of judgment herein, to-wit:—

1. The Court erred in holding that Chapter 253 of the General Laws of the State of Minnesota for 1903, approved at the General Election of 1904, increasing the rate of the gross earnings tax of railroad companies doing business in this State to four per cent, is valid as to the respondent, and in holding that said statute does not impair the contractual rights of the respondent, and is not repugnant to section 10 of Article 1 of the Constitution of the United States, wherein it is provided that no state shall pass any law impairing the obligation of contracts. It should have held that said Chap. 253 of the General laws of the State of Minnesota for 1903 n does impair the contractural rights of the respondent, and is therefore invalid, by reason of its being repugnant to said section 10 of Article 1 of the Constitution of the United States.

2. The Court erred in holding that said Chapter 253 of the General Laws of the State of Minnesota for 1903 is valid as to the respondent, and that said statute does not deprive the respondent of its property without due process of law. It should have held that said Chapter 253 is invalid as to respondent because said Chapter 253 deprives the respondent of its property without due process of law, in that it attempts to destroy and take from the respondent without compensation a right appurtenant to its lines of railway created by the Act of March 4, 1854, being the charter of the Minnesota & Northwestern Railroad Company, the predecessor in interest of respondent Chicago Great Western Railway Company, and acts amendatory thereof; all in violation of Section 1 of Article 14 of the amendments to the Constitution of the United States.

3. The Court erred in holding that the Act of March 4, 1854, being the charter of the Minnesota & Northwestern Railroad Company, and acts amendatory thereto, accepted by said company, did not constitute an irrevocable contract between the State of Minnesota and said Minnesota & Northwestern Railroad Company, by which said company became entitled to enjoy a fixed commuted system of taxation at the rate of 2% upon its annual gross earnings. It should have held that such acts did constitute an irrevocable contract between said State of Minnesota and said railway company, under which

the latter was entitled to enjoy said fixed commuted rate of taxation.

o 4. The Court erred in holding that the right of the Minnesota and Northwestern Railroad Company to a commuted system of taxation at the rate of 2% upon its annual gross earnings, arising under the Act of March 4, 1854, and acts amendatory thereto, did not pass to the Chicago, St. Paul & Kansas City Railway Company, under and through the consolidation of the said companies on December 8, 1887. The court should have held that by such consolidation of December 8, 1887, all such rights of the aforesaid Minnesota & Northwestern Railroad Company passed to said Chicago, St. Paul & Kansas City Railway Company, and that thereafter said Chicago, St. Paul & Kansas City Railway Company became entitled to enjoy the same rights and privileges in regard to taxation that theretofore had been enjoyed by said Minnesota & Northwestern Railroad Company.

5. The Court erred in holding that the right of the Chicago, St. Paul & Kansas City Railway Company to enjoy a commuted system of taxation at the rate of 2% upon its annual gross earnings acquired under and through the consolidation with the Minnesota & Northwestern Railroad Company, effected on December 8, 1887, did not pass and accrue to the Chicago Great Western Railway Company through the contract of consolidation entered into between said Chicago Great Western Railway Company on Sept. 7, 1893. The Court should have held that by reason of said consolidation between said railway companies all such rights of said Chicago, St. Paul & Kansas City Railway Company passed to the said Chicago Great Western Railway Company, and that thereafter said latter company became entitled to enjoy the same rights and privileges in regard to taxation that theretofore had been enjoyed by said Minnesota & Northwestern Railroad Company.

p 6. The Court erred in holding that the Act of March 4, 1854, and Acts amendatory thereto, did not constitute an irrevocable contract between the State of Minnesota and the Minnesota & Northwestern Railroad Company, by which said company became entitled to a fixed commuted rate of taxation at the rate of 2% upon its annual gross earnings, and that by the consolidation of Dec. 8, 1887, between said railroad company and the Chicago, St. Paul & Kansas City Railway Company, and by the consolidation of said railway company and the Chicago Great Western Railway Company on Sept. 7, 1893, said Chicago Great Western Railway Company did not become entitled to enjoy the same rate of taxation. The Court should have held that said act of March 4, 1854, and acts amendatory thereto, constituted an irrevocable contract between the State of Minnesota and the Minnesota & Northwestern Railroad Company, and that by the acts of consolidation aforesaid, all the rights created by said contract, including the right to pay said 2% upon the annual gross earnings of the railroad in lieu of all other taxes, passed to and are vested in respondent Chicago Great Western Railway Company.

7. The Court erred in holding that the transaction of December 8, 1887, between the Minnesota & Northwestern Railway Company

and Chicago, St. Paul & Kansas City Railway Company was a sale and not a consolidation pursuant to Chap. 83, Special Laws of 1883, authorizing the consolidation of said Minnesota & Northwestern Railroad Company with any other company which would undertake the construction and operation of its railroad. The Court should have held that such transaction was a consolidation pursuant to said act and was not a sale.

7 8. The Court erred in holding that the transaction between the Chicago, St. Paul & Kansas City Railway Company and the Chicago Great Western Railway Company, on Sept. 7, 1893, was a sale and not a consolidation pursuant to the Laws of the State of Minnesota. The Court should have held that such transaction was a consolidation of said railway companies, and not a sale.

9. The Court erred in holding that the amendment to Article 4 of the Constitution of the State of Minnesota, by the addition of Section 32*a* to said Article 4, gave to the Legislature the power to amend or repeal the charter of the Minnesota & Northwestern Railroad Company, insofar as the same related to the fixed commuted rate of taxation of 2% upon the annual gross earnings of said company. The Court should have held that the Act of March 4, 1854, and Acts amendatory thereto, constituting the charter of said railroad company, constituted an irrepealable contract between the State of Minnesota and said company, and that said constitutional amendment could not give the Legislature any power to repeal or modify said contract.

10. The Court erred in holding that when any and all grounds of forfeiture against the Minnesota & Northwestern Railroad Company were waived by the State by the passage of Chap. 83 of the Special Laws of 1883, such waiver did not revive in full force and effect the charter of said Minnesota & Northwestern Railroad Company. The Court should have held that such waiver did so revive and render fully and completely operative the charter of said railroad company as constituted by the original Act of March 4, 1854, and Acts amendatory thereto.

11. The Court erred in holding that the rights of the Minnesota & Northwestern Railroad Company, especially its right
r to enjoy a fixed commuted system of taxation, was to be determined, not as of the date of its original charter of March 4, 1854, and acts amendatory thereto, but as of the date of the passage of Chap. 83 of the Special Laws of 1883. The Court should have held that such rights were to be determined and construed as of the date of the passage of the Act of March 4, 1854, and of Acts amendatory thereto, especially Chap. 47 of the Laws of 1856.

12. The Court erred in holding that Chap. 83, Special Laws of 1883, did not confer upon the Minnesota & Northwestern Railroad Company the authority to transfer its right to a commuted system of taxation. It should have held that by said Chap. 83, said railroad company was authorized and empowered to convey all its rights and privileges, including the rights to said commuted system of taxation, to the Chicago, St. Paul & Kansas City Railway Company, with which company it consolidated, pursuant to the provisions of said Chap. 83.

13. The Court erred in holding that the decisions of the Supreme Court of the State of Minnesota have not created a rule of property in this state which vested in the respondent company a property right to a fixed commuted system of taxation at the rate of 2% upon its annual gross earnings and should have held that said decisions have created such a rule of property as to vest such property right in respondent.

14. The Court erred in ordering judgment to be entered in favor of said State of Minnesota and against said Chicago Great Western Railway Company for the sum of $24,979.62, because of each and every of the errors hereinbefore assigned.

s 15. The Court should have ordered that the judgment of the District Court by which it was adjudged that the plaintiff take nothing by this action should be affirmed.

DAVIS, KELLOGG & SEVERANCE,
Attorneys for Respondent.

Dated this 18th day of February, 1909.

(Endorsements:) 15991. Original. Supreme Court of State of Minnesota. State of Minnesota vs. C. G. W. Ry. Company. Assignments of Error. Filed February 18, 1909. C. A. Pidgeon, Clerk.

t STATE OF MINNESOTA,
Supreme Court, ss:

I, C. A. Pidgeon, Clerk of said Supreme Court, do hereby certify that the foregoing is a full and true copy of the Assignments of Error in U. S. Supreme Court in the cause therein entitled, as appears from the original, remaining on file in my office; that I have carefully compared the within copy with said original, and that the same is a correct transcript therefrom, and of the whole thereof.

Witness my hand and seal of said Supreme Court at the Capitol, in the city of St. Paul, this 25th day of February A. D. 1909.

[Seal of the Supreme Court, State of Minnesota.]

C. A. PIDGEON, *Clerk.*

u STATE OF MINNESOTA:

Supreme Court, October Term, A. D. 1908.

STATE OF MINNESOTA, Appellant,
vs.
CHICAGO GREAT WESTERN RY. CO., Respondent.

Assignments of Error.

The District Court erred:

First.

In holding as a conclusion of law that the act of March 1, 1856, constituted a valid contract between the Territory of Minnesota and

the Minnesota & North Western Railroad Company, fixing the rate of taxation to be paid by said company and that said contract rights were never forfeited or lost by that company.

Second.

In holding as a conclusion of law that the alleged contract right was transferred to the Chicago, St. Paul & Kansas City Railway Company and from that company to the defendant.

Third.

In ordering and entering judgment that Chapter XLVII of the Laws of 1856, being the charter of the Minnesota & North-Western Railroad Company, constituted a valid contract, the rights to and under which were never forfeited or lost by the Minnesota & North Western Railroad Company, but were transferred to the Chicago, St. Paul & Kansas City Railway Company and finally transferred to the defendant and that the lawful rate of taxation which the State of Minnesota may exact from the defendant is the sum of the two per cent upon each dollar of the gross receipts, proceeds and
v income of said defendant Railway Company, so far as the same may be received by or due said company on that part of said road lying within the limits of the State of Minnesota, and that such payment shall be in lieu of, and the company shall be exempt from the payment of any other imposts, taxes, or duties, any law to the contrary notwithstanding.

Fourth.

In ordering and entering judgment that the plaintiff take nothing by this action and that the same be dismissed.

Fifth

In not concluding as a matter of law that the State was entitled to, and in not ordering and entering judgment against the defendant for the sum of $24,979.62, with the statutory penalty thereon.

w STATE OF MINNESOTA,
Supreme Court, ss:

I, C. A. Pidgeon, Clerk of said Supreme Court, do hereby certify that the foregoing is a full and true copy of the Assignments of Error in State Supreme Court in the cause therein entitled, as appears from the original, remaining on file in my office; that I have carefully compared the within copy with said original, and that the same is a correct transcript therefrom, and of the whole thereof.

Witness my hand and seal of said Supreme Court at the Capitol, in the city of St. Paul, this 25th day of February A. D. 1909.

[Seal of the Supreme Court, State of Minnesota.]

C. A. PIDGEON, *Clerk.*

1 STATE OF MINNESOTA:

Supreme Court, October Term, 1908.

STATE OF MINNESOTA,
County of Ramsey:

District Court, Second Judicial District.

STATE OF MINNESOTA, Plaintiff,
vs.
CHICAGO GREAT WESTERN RAILWAY COMPANY, Defendant.

Complaint.

For its complaint herein the State of Minnesota alleges:

I.

That the defendant is now and at all the times hereinafter mentioned has been a corporation organized and existing under and by virtue of the laws of the State of Illinois.

II.

That during all of said times the defendant has been and is now the owner and in the control of a line of railway running
2 from the city of St. Paul, in the state of Minnesota, southward to and beyond the state line between Minnesota and Iowa, together with a branch line running from the village of Hayfield, in the county of Dodge, and state of Minnesota, in a southeasterly direction to and beyond the said state line. That during all of said times the defendant has been and is now operating said lines of railway in the usual manner as a common carrier of freight and passengers.

III.

That the gross earnings received by defendant from the operation of said lines of railway within the state of Minnesota, during the year 1905, amounted to the sum of $1,248,890.93. That 4 per cent. of said sum is $49,959.24, and that on March 1st, 1906, the said last named sum became due from the defendant to the state of Minnesota as its gross earnings tax for the year 1905.

IV.

That payment of said sum of $49,959.24 has been heretofore duly demanded by the defendant, but that defendant has neglected and refused, and still does neglect and refuse, to pay to the plaintiff, on account of its gross earnings tax for the year 1905, any other or greater sum than $24,979.62, which sum has been heretofore paid to the plaintiff, and that by reason of the premises there is now due and owing to the plaintiff from the defendant the sum of $24,979.62, with lawful interest.

3 Wherefore, plaintiff pray judgment against the defendant for the sum of $24,979.62, together with lawful interest and the costs and disbursements of this action.

EDWARD T. YOUNG,
Attorney General,
ROYAL A. STONE,
Assistant Attorney General,
Attorneys for Plaintiff, State Capitol, St. Paul, Minnesota.

(Title of Cause.)

Answer.

Now comes the Chicago Great Western Railway Company, and for answer to the complaint in the above entitled action states and alleges as follows:

I.

Defendant denies that it is a corporation created and existing under the laws of the state of Illinois, but alleges it to be a corporation existing under the laws of the states of Illinois, Iowa, and Minnesota by certain consolidation proceedings, as hereinafter more particularly stated.

II.

Defendant admits that it is the owner of a line of railway running from St. Paul, in the state of Minnesota, southward to and
4 beyond the state line between Minnesota and Iowa, and denies that it is the owner of a branch line extending from Hayfield, in the county of Dodge, state of Minnesota, in a southwesterly direction to and beyond the state line of the state of Minnesota, but alleges the fact to be that said branch line is owned by the Mason City & Fort Dodge Railroad Company, a railway corporation created and organized under and by virtue of the laws of the state of Iowa. It admits that it is operating the line of railway from St. Paul to the state line first above described in the usual manner, as a common carrier of freight and passengers.

III.

It admits the gross earnings of said road for the year 1905 to be $1,248,980.93, and alleges that the taxes thereon, duly and regularly levied under and by virtue of the charter of said company, as hereinafter stated, amount to the sum of $24,979.62, which sum was paid to the state of Minnesota, as required by law.

IV.

Defendant denies each and every other allegation in said complaint contained.

V.

For further answer and defense defendant alleges that the Minnesota & Northwestern Railroad Company was, until the consolidation

thereof hereinafter named, a railway corporation duly created
5 and organized under and by virtue of a special charter of the territorial legislature of the territory of Minnesota, passed March 4, 1854, entitled, "An Act to incorporate the Minnesota & Northwestern Railroad Company;" to which act the defendant hereby makes reference for greater certainty. That thereafter and on February 16, 1855, the territorial legislature of the territory of Minnesota duly passed an act amending the charter of the Minnesota & Northwestern Railroad Company, entitled "A Bill to amend an act entitled 'An Act to incorporate the Minnesota & Northwestern Railroad Company.'" That on the 21st day of February, 1855, the legislature of the territory of Minnesota amended said charter by an act entitled "A Bill supplementary to an act entitled 'An Act to amend the — Minnesota & Northwestern Railroad Company;'" and about the same time amended said charter by a further act entitled "An Act supplementary to an act entitled 'An Act to amend the — Minnesota & Northwestern Railroad Company,'" to which various acts reference is hereby made for greater certainty. That thereafter and on the 1st day of March, 1856, the legislature of the territory of Minnesota duly amended the charter of the Minnesota & Northwestern Railroad Company by an act entitled "An Act granting an extension of time to the Minnesota & Northwestern Railroad Company and for other purposes," approved March 1, 1856. That thereafter the legislature duly amended the charter of said Minnesota & Northwestern Railroad Company by the following acts: An
6 act entitled "An Act to relieve the Minnesota & Northwestern Railroad Company," approved August 10, 1858; an act entitled "An Act to amend the charter of the Minnesota & Northwestern Railroad Company," approved February 26, 1872; and an act entitled "An Act to amend the charter of the Minnesota & Northwestern Railroad Company," approved March 6, 1883.

That by sections 2 and 3, of Chapter XLVII, of the Laws of 1856, amending the charter of the Minnesota & Northwestern Railroad Company, it was provided as follows, to-wit:

"SEC. 2. In consideration of the grant of lands contemplated in the 8th section of the charter to said company, approved March 4th, 1854, and of the extension of time to said company as herein stated, and in further consideration of the restoration of all rights, powers and franchises to said company which may be supposed to have for any cause become forfeited to the territory of Minnesota, said corporation binds and obliges itself to pay, or cause to be paid, to the territory or future state of Minnesota, two per cent. upon each dollar of the gross receipts, proceeds and income of said railroad, so far as the same may be received or due them on that part of said road lying within the limits of the territory or future state of Minnesota, to be paid to the treasurer of said territory or future state annually, on the first day of January in each year, from and after the day when the cars shall commence running on any part of said road in said territory or future state of Minnesota, and which
7 proceeds shall be appropriated to the payment of the territorial or state government expense, and such payments shall

be in lieu of and the said company shall be exempt from the payments of any other imposts, taxes or dividends, any law to the contrary notwithstanding.

SEC. 3. And for the purpose of ascertaining the proceeds, receipts or income aforesaid, an accurate account shall be kept by said company, a copy whereof shall be furnished to the governor of the territory or future state of Minnesota; the truth of which account shall be verified by the affidavits of the president and treasurer of said company. And for the purpose of verifying and ascertaining the accuracy of such account, full power is hereby vested in the governor of the territory or future state of Minnesota, or any other person by law appointed, to examine the books and papers of said corporation, and to examine, under oath, the officers, agents and employés of said company, and other persons, and if any person so examined by the governor or other authority shall knowingly and willingly swear falsely, or if the officers making such affidavits shall knowingly and wilfully swear falsely, every such person shall be subject to the pains and penalties of perjury. The territory or future state of Minnesota shall have a prior lien upon said road and branches, and all the appurtenances and stock thereof, for all penalties, taxes and dues which may accrue to the territory or future state from said corporation, as herein provided; which lien of the territory
8 or future state shall take precedence of all demands, judgments or decrees against said corporation."

That the Minnesota & Northwestern Railroad Company accepted each and all of said acts of incorporation and the amendments thereto, and performed the conditions therein and duly constructed a line of railroad from St. Paul, Minnesota, to the south line of the state on or about October 1st, 1885.

VI.

That thereafter and on or about the 8th day of December, 1887, the Minnesota & Northwestern Railroad Company not only owned the line of railway from St. Paul to the south line of the state, but a line of railway from said south line of the state through Oelwein, in the state of Iowa, to Dubuque, in the state of Iowa, and a line of railway from Dubuque to Chicago, in the the state of Illinois; that on or about the said date the Chicago, St. Paul & Kansas City Railway Company owned a line of railway extending from Oelwein station, in the state of Iowa, in a southwesterly direction to the city of Des Moines, in the said state of Iowa, with a branch line to the city of Cedar Falls, Iowa; also certain branch lines to coal mines in said state, and was engaged in the construction of an extension of said line from the city of Des Moines, in a southwesterly direction to the city of St. Joseph, in the state of Missouri; that the statutes of Iowa, among other thing, in substance provide: That any corporation organized under the laws of the state of Iowa may join, inter-
9 sect and unite its railway with that of any other railway at such point upon the boundary line of said state, and with the consent of three-fourths in interest of all the stockholders, by purchase, sale or otherwise, may merge and consolidate the stock, prop-

erty, franchises and liabilities of such corporations, making the same one corporation, upon such terms as may be agreed upon not in conflict of law; that on or about the 8th day of December, 1887, with the concurrence and approval, as required by the laws of Minnesota and Iowa, of three-fourths of the stockholders of each of said railway companies, a contract of consolidation of the said railways was entered into, a copy of which is hereto attached, marked "Exhibit A," and made a part of this answer as fully as though recited herein in length; that under and pursuant to such contract, on or about said date, a deed of consolidation was made from the Minnesota & Northwestern Railroad Company to the Chicago, St. Paul & Kansas City Railway Company, a copy of which is hereto attached, marked "Exhibit B," and made a part hereof as fully as though recited herein in length; that thereafter the said Chicago, St. Paul & Kansas City Railway Company completed its line of railway to the city of St. Joseph, in the state of Missouri, and the city of Kansas City, in the state of Missouri, and operated the same until the consolidation of the same with the Chicago Great Western Railway, as hereinafter set forth; that the Chicago Great Western Railway Company was originally incorporated under and by virtue of the laws of
10 the state of Illinois prior to the year 1892; that the legislature of the state of Illinois in 1885 passed an act as follows, to-wit:

"Be it enacted by the people of the state of Illinois, represented in the General Assembly: That all railroad companies now organized, or hereafter to be organized, under the laws of this state, which now are, or hereafter may be, in possession of and operating in connection with or extension of their own railway lines, any other railroad or railroads in this state, or in any other state or states, or owning and operating a railroad which connects at the boundary line of this state with a railroad in another state, are hereby authorized and empowered to purchase and hold in fee simple or otherwise, and to use and enjoy the railway property, corporate rights and franchises of the company or companies owning such other road or roads, upon such terms and conditions as may be agreed upon between the directors and approved by the stockholders, owning not less than two-thirds in amount of the capital stock of the respective corporations becoming parties to such purchase and sale; such approval may be given at any annual or special meeting, upon sixty days' notice being given to all shareholders, of the question to be acted on, by publication in some newspaper published in the county where the principal business office of the corporation is situated; provided, that notice of any special meeting called to act upon such question shall be given to each stockholder whose postoffice address is known, by depositing in the post-
11 office, at least thirty days before the time appointed for such meeting, a notice properly addressed and stamped, signed by the secretary of the company, stating the time, place and object of such meeting; and, provided, further, that no railroad corporation shall be permitted to purchase any railroad which is a parallel or

competing line with any line owned or operated by such corporation."

That said statute has ever since been and now is in force in said state.

That under and by virtue of the Statutes of the State of Illinois any railway corporation in Illinois was authorized to lease the line of railroad of any other railroad, either in Illinois or in any other state or states; and by the laws of the state of Iowa any railroad company created and organized under and by virtue of the laws of the state of Iowa was authorized to lease its line of railway to any railroad corporation created by or under the laws of any other state.

That on or about the 13th day of June, 1892, the Chicago, St. Paul & Kansas City Railway Company duly made to the Chicago Great Western Railway Company a lease of all its line of railway, a copy of which said lease is hereto attached, marked "Exhibit C," and made a part of this answer; that said lease was duly authorized by the board of directors and more than three-fourths of the stockholders in number and amount of each of said railways, as required by law; that in about the month of September, 1893, the Chicago Great Western Railway Company and the Chicago, St. Paul
12 & Kansas City Railway Company, being authorized so to do by the laws of the states of Illinois, Iowa and Minnesota, duly entered into a contract and agreement of consolidation of the railways and stocks of the said two companies, a copy of which is set forth in the report of the committee of reorganization and in the deed made pursuant thereto from the Chicago, St. Paul & Kansas City Railway Company to the Chicago Great Western Railway Company, copies of which are hereto attached, marked Exhibits "D" and "E," and made a part of this answer as fully as though recited herein in length. That said agreement of consolidation and deed, and the terms ther-of, were duly agreed upon between the directors of each of said corporations, duly approved by the boards of directors of each of said corporations, and the terms and conditions thereof were approved, ratified, authorized and confirmed by the stockholders owning more than three-fourths in amount of the capital stock of the respective corporations becoming parties to such purchase, sale and consolidation, and that such approval by said stockholders was given at a special meeting of said stockholders, duly called and held upon sixty days' notice being given to all stockholders of the question to be acted upon and by publication published in the county where the principal office of each of said corporations was situated, as required by the laws of the state of Illinois and the State of Iowa; that under such consolidation, deed and purchase the Chicago Great Western Railway Company acquired all the railroad and property of the Minnesota & North-
13 western Railroad Company, the Chicago, St. Paul & Kansas City Railroad Company, and all the franchises, contract rights, privileges, and immunities of each of said companies, including the contract for the communited system of taxation, as heretofore alleged; that from the time of the construction of the Minnesota & Northwestern Railroad in the state of Minnesota,

to-wit: on or about October 1st, 1885, the said railroad company duly paid annually to the state of Minnesota two per cent. (2%) of its gross earnings, as required by law, and the same was by said state duly received each year; that said charter granted by the territory of Minnesota providing for the payment of two per cent (2%) of the gross receipts, proceeds and income of said railroad in lieu of any other form of taxation, and providing that the said company shall be exempt from any other imposts, taxes or dividends (any law to the contrary notwithstanding) was a contract between the said Minnesota & Northwestern Railroad Company and its successor companies owning and operating said line of railroad in the state of Minnesota which the legislature of said state could not impair.

That notwithstanding the said contract and that said Minnesota & Northwestern Railroad Company and said successor corporations had kept the terms thereof and paid to the state of Minnesota, as required by law, two per cent (2%) of its gross income and proceeds, the legislature of said state did, in the year 1903, in violation of the constitutional rights of this defendant, and in violation
14 of the Constitution of the United States, pass an act entitled "An Act providing for the taxation of railroad properties, the collection of such taxes, and repealing acts inconsistent therewith," which act is in words and figures as follows, to-wit:

"SECTION 1. Every railroad company owning or operating any line of railway situated within, or partly within, this state, shall during the year 1905, and annually thereafter pay into the treasury of this state in lieu of all taxes and assessments upon all property within this state, owned or operated for railway purposes by such company, including equipment, appurtenances, appendages and franchises thereof, a sum of money equal to four (4) per cent. of the gross earnings derived from the operation of such line of railway within this state; and the annual payment of such sum shall be in full and in lieu of all other taxes and assessments upon the property and franchises so taxed. The lands acquired by public grant shall be and remain exempt from taxation until sold or contracted to be sold, or conveyed, as provided in the respective acts whereby such grants were made or recognized.

SEC. 2. The term 'the gross earnings derived from the operation of such line of railway within this state,' as used in section 1 of this act is hereby declared and shall be construed to mean, all earnings on business beginning and ending within the state, and a proportion, based upon the proportion of the mileage within the state to the entire mileage over which such business is done, of
15 earnings on all interstate business passing through, into or out of the state.

SEC. 3. All acts and parts of acts not inconsistent herewith regulating the payment, collection, time of payment, enforcement or reports involving the amount of taxes upon the gross earnings of railroad companies within this state, or providing penalties for the nonpayment of such taxes, are hereby made applicable to this act so far as may be; and all acts and parts of acts inconsistent with the provisions of this act are hereby repealed.

Sec. 4. Upon failure to pay the amount of such taxes legally due upon the date heretofore provided by law for the payment thereof, in addition to existing remedies, collection may be enforced in a civil action brought in the name of the state of Minnesota in the District Court of any county.

Sec. 5. Before any railroad company shall be heard to contest or continue to contest the validity of this act, or any part thereof, such railroad company shall as a condition precedent thereto pay into the treasury of the state of Minnesota the amount of taxes due or payable from such railroad company under the existing tax laws of this state applicable to such company.

Sec. 6. This act shall be submitted to the people of this state for their approval or rejection at the next general election for the year 1904.

The secretary of state shall cause to be printed in bold type upon the ballot used in voting for state officers or upon a separate ballot, if so provided by law at the said election, in manner conform-
16 able with the requirements of the general election law, the words, "For increasing the gross earnings tax of railroad companies from three to four per cent. Yes.... No...."

And each voter voting at such election shall designate his vote by a cross mark made opposite one or the other of the words "Yes" or "No," and the said elector shall in all respects conform, as far as may be, to the requirements of the general election law, and the returns of said election shall be made, canvassed and certified, and the results thereof declared in the manner provided by law for returning, certifying and canvassing votes cast for state officers.

Sec. 7. This act shall take effect and be in force from and after its passage.

Approved April 18, 1903.

That said act was submitted to the electors of the state of Minnesota, as required by law, at the next general election thereafter held in the year 1904, and the same was adopted by a vote of said electors, and the proper proclamation was issued by the governor on January 6, 1905, putting said act into effect, as required by law; that said act is in violation of Section 10, of Article I, Constitution of the United States, prohibiting the states from passing any law impairing the obligation of contracts, and of Section 1, Article XIV., Constitution of the United States, providing that no state shall deprive any person of life, liberty or property without due process of law; that said law impairs the obligation of the contract existing between the territory of Minnesota and the state of Minne-
17 sota and this defendant.

Wherefore, defendant asks that it have judgment declaring said law of 1903, imposing a tax of four per cent. (4%) per annum upon the gross earnings derived from the operation of the defendant's railway, void, as in violation of the Constitution of the United States, and declaring that under the charter of this defendant the taxes of said corporation upon said line of railway shall be two per cent (2%) per annum upon said gross earnings, and that it have

judgment for its costs and disbursements herein, and such other and further judgment as may be consistent with equity.

DAVIS, KELLOGG & SEVERANCE,
Defendant's Attorneys, St. Paul, Minnesota.

EXHIBIT "A."

Minnesota and Northwestern Railroad Company
with
Chicago, St. Paul and Kansas City Railway Company.

Contract.

This Contract, made this 8th day of December, A. D. 1887, between the Minnesota and Northwestern Railroad Company, a corporation under the laws of Minnesota, party of the first part,
18 hereinafter called for convenience "The Minnesota Company," and the Chicago, St. Paul and Kansas City Railway Company, a corporation under the laws of Iowa, party of the second part, hereinafter called for convenience "The Iowa Company," witnesseth:

Whereas, the said Minnesota Company now owns a railroad extending from the City of St. Paul, State of Minnesota, in a southerly, southeasterly and easterly direction to Forest Home Junction, near the City of Chicago, State of Illinois, with a branch extending from Hayfield Station, on its main line, in the County of Dodge, State of Minnesota, in a southerly direction to Manly Junction, in the County of Worth, State of Iowa; also with a branch extending from the Station of Sumner, in Bremer county, State of Iowa, in a southwesterly and westerly direction to Hampton, in the County of Franklin, Iowa, formerly the Dubuque and Dakota Railroad; in all about five hundred and ten miles of single track railroad; also about four miles of double track from West St. Paul to South St. Paul, in the Counties of Ramsey and Dakota, in the State of Minnesota; and

Whereas, the said Iowa Company owns and operates a railroad extending from Oelwein Station, on the line of the Minnesota Company's said railroad in Fayette County, State of Iowa, in a southwesterly direction to the City of Des Moines, in said State of Iowa, with a branch from said line to the City of Cedar Falls, Iowa, and also a branch to certain coal mines in said state; and is
19 constructing an extension of its said line from said City of Des Moines in a southwesterly direction to the City of St. Joseph, State of Missouri; and

Whereas, the said railways of both companies will form when said lines now under construction are completed continuous lines of railroad between the following points, to-wit: from Chicago, Illinois, to St. Joseph, Missouri; from Chicago, Illinois, to St. Paul, Minnesota; from St. Paul, Minnesota, to St. Joseph, Missouri; and all of said railroads can be most economically and advantageously owned and operated together as one railroad or railroad system,

both as regards the interests of the parties hereto and the interests of the public; and

Whereas, the railway of the Minnesota and Northwestern Company is incumbered by a certain mortgage known as the "First Mortgage," made by said company to the Metropolitan Trust Company of the City of New York and Robert H. Benson of London, England, trustees, bearing date the first day of July, A. D. 1884, and securing bonds issued from time to time by said company, known and described in said mortgage as "First Mortgage Five per cent Gold Bonds," and the amount of bonds outstanding and secured by said mortgage in the sum of nine million —— thousand dollar par value, upon which all interest heretofore accrued has been paid. And said railroad formerly belonging to the Dubuque and Dakota Railroad Company aforesaid is also incumbered by a mortgage thereon executed by the Dubuque and Dakota Railroad Com-
20 pany to secure bonds of said company which were issued to the amount of ten thousand dollars per mile; eighty-four of said bonds are still outstanding, which the Minnesota Company has assumed and agreed to pay; but the amount thereof, together with Minnesota and Northwestern bonds issued with respect to said Dubuque and Dakota Railroad, does not exceed the amount of bonds which the Minnesota Company was authorized to issue with respect to said Dubuque and Dakota road by its first mortgage; and

Whereas, the said railway of the Minnesota Company is further incumbered by a second mortgage thereon, executed by said company to the Metropolitan Trust Company of the City of New York, bearing date the first day of December, A. D. 1887, securing bonds of said company to the amount of two million dollars, described in said mortgage as "Five per cent Debenture and equipment Gold Bonds;" and

Whereas, said Minnesota Company has issued its common and preferred stock which is now outstanding, and the preferred stock entitles the holder thereof to such dividends non-cumulative out of the net earnings of the company as the Board of Directors may from time to time declare, not exceeding seven per cent for any one year prior to the payment of any dividend upon any other stock of said company. The aggregate amount of common stock of the Minnesota Company outstanding is the sum of seven million seven-
teen thousand nine hundred dollars; and the aggregate
21 amount of preferred stock so outstanding is the sum of four million nine hundred and eighty-one thousand seven hundred dollars; and

Whereas, this contract has been duly authorized by over three-fourths in interest of all the stockholders of each party hereto, and the presidents and secretaries of each party have been duly directed to execute the same on behalf of each company by a resolution of the Board of Directors of each Company;

Now, therefore, in consideration of the premises, and the several mutual agreements hereinafter contained and the sum of one dollar by each party to the other in hand paid, the receipt whereof is hereby acknowledged, the said parties hereto agree as follows:

The said Minnesota Company agrees to sell, assign and convey to said Iowa Company, by good and sufficient warranty deed or other proper instrument, with proper covenants, all its said railroad and railroads now constructed and in process of construction, together with all its right-of-way, road-bed, bridges, culverts, viaducts, depots, shops, coal houses, warehouses, water tanks, stock yards, fences and other structures and buildings; all its engines, cars and rolling stock; all its office furniture and supplies; all its tools, machinery and implements; all its telegraph lines, wires and instruments; all its leases, contracts rights privileges and immunities; all its choses in action, accounts, bills, notes and moneys; and generally all its prop-
22 erty, real, personal and mixed, as fully as if specifically enumerated herein, together with all the tolls, incomes, issues, rents and revenues of said property, and the appurtenances thereto, subject to the several incumbrances above described.

The said Iowa Company hereby assumes and agrees and covenants to pay the mortgages and bonds of the Minnesota Company outstanding as aforesaid, and the mortgage and bonds of the Dubuque and Dakota Railroad Company outstanding, and protect the Minnesota Company therefrom. It further assumes and agrees and covenants to pay all the indebtedness and liabilities of the Minnesota Company of every kind and description as fully as if the same were specifically enumerated herein, and protect the Minnesota Company therefrom. The said Iowa Company further assumes and agrees and covenants to perform all the contracts and legal duties and obligations of the Minnesota Company, and protect the Minnesota Company from all damages with respect thereto; the intention hereof being that the Iowa Company assumes and stands in the place of the Minnesota Company with respect to all the debts, contracts, duties and obligations of the Minnesota Company, to the same extent as if said Iowa Company had originally been bound or subject to said debts, contracts, duties and obligations.

It is further expressly agreed, that if the said Minnesota Company shall have the right to issue further bonds under the terms of its first mortgage, in excess of the amount now outstanding as above stated, before the deed or instrument of transfer to
23 the Iowa Company is delivered, the Minnesota Company may issue said bonds and in that event the Iowa Company will take its deed subject to and assume and agree to pay the same. If said Five per cent Debenture and Equipment Gold Bonds or any of them shall not be actually executed, certified and issued when said deed or instrument of transfer is delivered, the said bonds may be executed by the Minnesota Company, certified, and issued after such deed is delivered, with the same effect as if they were now outstanding, and the Iowa Company agrees to take said deed subject to the right to issue the same thereafter and agrees to assume and pay the same. In such event the bonds when issued shall be delivered to the Iowa Company, to be sold and negotiated by it in its discretion.

The said parties mutually agree with each other for the use and benefit of the holders of stock in said Minnesota Company, that the said Iowa Company will, upon the delivery of the deed or deeds of

conveyance before mentioned, issue its common stock in an aggregate amount equal to the par value of the common stock of the Minnesota Company outstanding as before stated, to-wit, in the amount of seven million seventeen thousand nine hundred dollars, and exchange the same share for share at par with each and every holder of common stock in said Minnesota Company as fast as said common stock of the Minnesota Company shall be assigned and delivered to the Iowa Company.

That the Iowa Company will execute and issue bonds of
24 said company, to be known as income bonds, payable on the 1st day of July, 1936, bearing such interest not exceeding five per cent per annum, non-cumulative, as the Board of Directors may annually fix and declare as the annual installment of interest, payable out of the net earnings of each year properly applicable to the purpose. That said bonds shall be so conditioned that interest thereon to the extent of five per cent per annum, non-cumulative as aforesaid, shall be payable before any dividend is declared or paid on the common stock of said Iowa Company; and said income bonds, in case the net earnings of said Iowa Company properly applicable to the purpose are in any year not sufficient to pay five per cent interest thereon, shall be made thereupon convertible and redeemable dollar for dollar at par at the option of said Iowa Company, or of the payee of each bond, into preferred stock of said Iowa Company, which preferred stock shall be entitled to a preference divided out of the net earnings of the Iowa Company of five per cent per annum, non-cumulative, before any dividend is paid in any year upon the common stock of said company. After paying five per cent upon said common stock in any year, any further dividend shall be declared ratably upon both common and preferred stock.

It is further agreed and declared, that in case the Railway Company should have a right to exercise its option to convert the income bonds into preferred stock, and should not avail itself of such option, and some holders of income bonds should convert the same
25 into preferred stock and some should not do so, then and in such case it is the intention hereof that the income bonds shall have the same and an equal right to interest which the preferred stock has to dividend, to the extent of five per cent per annum. That net earnings applicable to the purpose shall be applied equally and proportionally to pay dividends on such preferred stock and interest on the income bonds, to the extent of five per cent per annum, and that each shall have the same preference over common stock.

That the Iowa Company will deliver four million nine hundred and eighty-one thousand seven hundred dollars of said income bonds to the said Minnesota Company for the benefit of and in trust for the preferred stockholders of said Minnesota Company. Said income bonds shall be held by the Minnesota Company upon the following trusts and conditions: It will exchange the same dollar for dollar at par for preferred stock of the Minnesota Company with each and every holder of such stock as fast as such stock shall be surrendered; such preferred stock as fast as so surrendered shall be cancelled. If any interest shall be paid on said income bonds while the same

or any part of them are held by the Minnesota Company, the interest payable on bonds so held shall be paid to the Minnesota Company for the benefit of and in trust for the holders of its preferred stock then outstanding. And the Minnesota Company agrees to pay to its said stockholders proportionally whatever interest it may from time to time receive on said income bonds.

26 It is hereby agreed that the issue of said income bonds is hereby so limited that the aggregate amount thereof outstanding shall at no time exceed ten thousand dollars per mile of completed railway of the Iowa Company.

In witness whereof, the Minnesota and Northwestern Railroad Company has hereunto affixed its corporate seal and caused these presents to be signed by its president and secretary; and the Chicago, St. Paul and Kansas City Railway Company has hereunto affixed its corporate seal and caused these presents to be signed by its president and secretary, the day and year above written.

MINNESOTA AND NORTHWESTERN RAILROAD COMPANY.

By ——— ———, *President.*

——— ———, *Secretary.*

CHICAGO, ST. PAUL AND KANSAS CITY RAILWAY COMPANY.

By ——— ———, *President.*

——— ———, *Secretary.*

EXHIBIT "B."

Deed.

This indenture, made this 8th day of December, A. D. 1887, by and between the Minnesota and Northwestern Railroad Company, a corporation duly formed and organized under and by virtue of the laws of the State of Minnesota, party of the first part, and the

27 Chicago, St. Paul and Kansas City Railway Company, a corporation duly formed and organized under and by virtue of the laws of the State of Iowa, party of the second part, witnesseth:

Whereas, the said Minnesota Company now owns a railroad extending from the City of St. Paul, State of Minnesota, in a southerly, southeasterly and easterly direction to Forest Home Junction, near the City of Chicago, State of Illinois; with a branch extending from Hayfield Station on its main line, in the County of Dodge, State of Minnesota, in a southerly direction to Manly Junction, in the County of Worth, State of Iowa; also with a branch extending from the station of Sumner, in Bremer County, State of Iowa, in a southwesterly and westerly direction to Hampton, in the County of Franklin, Iowa, formerly the Dubuque & Dakota Railroad; in all about five hundred and ten miles of single track railroad; also about four miles of double track from West St. Paul to South St. Paul, in the Counties of Ramsey and Dakota, in the State of Minnesota; and

Whereas, the said Iowa Company owns and operates a railroad extending from Oelwein Station, on the line of the Minnesota Com-

pany's said railroad in Fayette County, State of Iowa, in a southwesterly direction to the City of Des Moines, in said State of Iowa, with a branch from said line to the City of Cedar Falls, Iowa, and also a branch to certain coal mines in said state; and is constructing an extension of its said line from said City of Des Moines in a
28 southwesterly direction to the City of St. Joseph, State of Missouri; and

Whereas, the said railways of both companies will form when said lines now under construction are completed continuous lines of railroad between the following points, to-wit: From Chicago, Illinois, to St. Joseph, Missouri; from Chicago, Illinois, to St. Paul, Minnesota; from St. Paul, Minnesota, to St. Joseph, Missouri; and all of said railroads can be most economically and advantageously owned and operated together as one railroad or railroad system, both as regards the interests of the parties hereto and the interests of the public; and

Whereas, the railway of the Minnesota and Northwestern Company is incumbered by a certain mortgage known as the "First Mortgage," made by said company to the Metropolitan Trust Company of the City of New York and Robert H. Benson of London, England, trustees, bearing date the first day of July, A. D. 1881, and securing bonds issued from time to time by said company, known and described in said mortgage as "First Mortgage Five per cent Gold Bonds," and the amount of bonds outstanding and secured by said mortgage is the sum of nine million six hundred and twenty-eight thousand dollars par value, upon which all interest heretofore accrued has been paid. And said railroad formerly belonging to the Dubuque and Dakota Railroad Company aforesaid is also incumbered by a mortgage thereon executed by the Dubuque and Dakota Railroad Company to secure bonds of said company, which were issued to the amount of ten thousand dollars per mile; eighty-
29 four of said bonds are still outstanding, which the Minnesota Company has assumed and agreed to pay; but the amount thereof, together with the Minnesota and Northwestern bonds issued with respect to said Dubuque and Dakota Railroad does not exceed the amount of bonds which the Minnesota Company was authorized to issue with respect to said Dubuque and Dakota Railroad by its first mortgage; and

Whereas, the railway of the said Minnesota Company is further incumbered by a second mortgage or deed of trust bearing date the first day of December, A. D. 1887, executed by said company to The Metropolitan Trust Company of the City of New York, securing bonds of said company to the amount of two million dollars, known as Five per cent Debenture and Equipment Bonds; and

Whereas, said parties have entered into a contract bearing even date herewith, which contract has been duly executed by the proper officers of each company under the respective corporate seals of said companies, and has been duly authorized by the Boards of Directors of each Company, and by the stockholders of each company, over three-fourths in interest of all the stockholders of each company having directed the execution of said contract, and by the terms of

said contract all the railroad and property of the said Minnesota and Northwestern Railroad Company is to be transferred and conveyed to the said Chicago, St. Paul and Kansas City Railway Company, subject to the terms, limitations and conditions more fully stated
30 in said contract, and subject to the mortgages upon said properties above recited.

Now, therefore, this indenture, witnesseth, that in consideration of the premises, and in pursuance of the agreements in said contract contained, and as part performance of said contract, and in consideration of one dollar in hand paid by the said party of the second part to the said party of the first part, the receipt whereof is hereby acknowledged, the said party of the first part has granted, bargained and sold, and by these presents does grant, bargain, sell, assign, convey and transfer unto the Chicago, St. Paul and Kansas City Railway Company, party of the second part, and its successors and assigns forever, all and singular, the railroads and railways of the said party of the first part now constructed and in process of construction, together with all its rights-of-way, roadbed, bridges, culverts, viaducts, depots, shops, coal houses, warehouses, water tanks, stock yards, fences and other structures and buildings; all its engines, cars and rolling stock; all its office furniture and supplies, all its tools, machinery and implements; all its telegraph lines, wires and instruments; all its leases, contracts, rights, privileges and immunities; all its choses in action, accounts, bills, notes and moneys, and generally all its property, real, personal and mixed, of every kind, nature and description, as fully as it specifically enumerated herein, together with all the tolls, income, issues, rents and revenues of said property, and all appurtenances thereto.

31 To have and to hold, unto the said party of the second part, its successors and assigns, forever.

The said Iowa Company hereby assumes and agrees and covenants to pay the mortgages and bonds of the Minnesota Company outstanding as aforesaid, and the mortgage and bonds of the Dubuque and Dakota Railroad Company outstanding, and protect the Minnesota Company therefrom. It further assumes and agrees and covenants to pay all the indebtedness and liabilities of the Minnesota Company of every kind and description, as fully as if the same were specifically enumerated herein, and protect the Minnesota Company therefrom. The said grantee further assumes and agrees and covenants to perform all the contracts and legal duties and obligations of the Minnesota Company, and protect the Minnesota Company from all damage with respect thereto. The intention hereof being that the grantee assumes and stands in place of the Minnesota Company with respect to all the debts, contracts, duties and obligations of the Minnesota Company to the same extent as if the said grantee had originally been bound or subject to said debts, contracts, duties and obligations.

Now, said party of the first part, for and on behalf of itself, its successors and assigns, does hereby covenant and agree to and with the said party of the second part, its successors and assigns, that it is seized of the property hereby conveyed; that it has good and lawful

right and authority to convey the same; that the same is
32 free from all incumbrances, liens and charges of every kind whatsoever, except the mortgages hereinabove recited; that it will make such further conveyances and assurances of title as may be advised or required, and that it will forever warrant and defend the title to said premises against the lawful claims of all persons, except as to the mortgages hereinbefore described.

In witness whereof, the said party of the first part has caused these presents to be executed by its president, with its corporate seal attached, and attested by its secretary, the day and year first above written.

MINNESOTA AND NORTHWESTERN RAILROAD COMPANY.
By A. B. STICKNEY, *President.*
JOHN I. THOMPSON, *Secretary.*

Signed, sealed and delivered in the presence of
RAYMOND DUPUY
ROBT. C. WIGHT.
F. W. DAVIS.

(Minnesota & Northwestern Railroad Company Corporate Seal.)

(Duly acknowledged.)

No. 868.

STATE OF MINNESOTA,
County of Dodge, ss:

I, E. H. Emerson, Recorder of said county, hereby certify that the within deed was filed for record in my office on the 18th day of February, 1888, at 11:30 A. M., and was duly recorded
33 in Book 16, of Deeds, on pages 535, &c.

[SEAL.] E. H. EMERSON, *Recorder.*

STATE OF MINNESOTA,
Department of State.

I hereby certify that the within instrument was filed for record in this office on the 23d day of February, A. D. 1888, at 12 o'clock M., and was duly recorded in Book 5, of General Railroad Records, on page —

H. MATTSON,
Secretary of State.

EXHIBIT "C."

Lease.

Chicago, St. Paul & Kansas City Railway Company
to
Chicago Great Western Railway Company.

This indenture, made this thirtieth day of June, 1892, between the Chicago, St. Paul & Kansas City Railway Company, a corporation of the State of Iowa, party of the first part, hereinafter for convenience call- the first party, and the Chicago Great Western
34 Railway Company, a corporation of the State of Illinois, party of the second part, hereinafter for convenience called the second party, witnesseth:

Whereas, the party of the first part owns about 815 miles of railway in the States of Illinois, Iowa, Minnesota and Missouri, and leases from various corporations about 107 miles of railway, making a total mileage of about 922 miles, and the same forms a continuous main line of railway between Chicago, Illinois, and St. Paul and Minneapolis, Minnesota, between Chicago and Kansas City through St. Joseph, Missouri, and between St. Paul and Minneapolis, and St. Joseph and Kansas City, with various branches; and

Whereas, the first party will have outstanding on the first day of July, 1892,

$2,823,150 five per cent. Sterling Priority Loan, payable in 1934, or at the option of the company on six months notice at 105, at any time prior thereto; also

$9,628,000 Minnesota and Northwestern First Mortgage five per cent bonds, due in 1934; also

$9,326,000 Chicago, St. Paul & Kansas City First Mortgage five per cent bonds, due in 1936, or at the option of the company redeemable on any interest paying day prior thereto, on notice, at 105, making a total of $21,777,150, all of which bears interest from and after July 1st, 1892, at the rate of five per cent per annum; also has leased rolling stock valued at,

$1,723,430 97, on which rentals are payable monthly, and

Whereas, in addition to the foregoing the company has
35 outstanding the following Junior Securities, viz.:

$4,886,000 General Mortgage four per cent bonds, bearing interest after July 1st, 1892;

$4,981,700 income bonds, bearing five per cent non-cumulative interest, payable only when earned, and

$14,892,900 stock.

Now, therefore, in consideration of one dollar to it in hand paid, and the promises and agreements hereinafter contained, the party of the first part hereby leases to the party of the second part, from and after the first day of July, 1892, during the term of ninety-nine years thereafter, all its railway, railway equipment and appurtenances, rights, franchises, privileges and easements, including all property of every kind and description, owned by the first party,

or in which it has any right, title or interest, used or necessary or convenient for use in the operation of said railway; assigning also to the second party all and every of the first party's rights as lessee, or under any form of contract to use the railway tracks, bridges, or other property of any other person or corporation.

And the first party further agrees that on the first day of July, 1892, it will turn over to the second party all the cash then in its treasury, and that it will and hereby does assign to the second party all amounts which shall then be due from station agents, and conductors, from individuals and corporations, also all fuel, material and other supplies then on hand necessary or convenient for
36 use in the operation, maintenance, and renewal of said leased property, at their fair market value. These items it is expected, will aggregate, as nearly as can now be approximated, $400,000, be the same more or less.

And it is mutually agreed that the value of the fuel, material, and other supplies on hand and the amount of cash turned over, shall be immediately credited by the second party to the first party, and that amounts collected on accounts against station agents and conductors, individuals and corporations, shall be so credited, as and when they are received. Against this credit the second party agrees that on the first day of July aforesaid, and from time to time thereafter, as it may be required, it will advance and pay for the first party all its current unpaid vouchers, and pay rolls, and the current book accounts with individuals and corporations which shall have been incurred or have accrued prior to said first day of July, 1892, which amounts it is expected will approximate in the aggregate, $750,000, be the same more or less.

As said unpaid vouchers, pay rolls, and current accounts, which the second party has thus agreed to pay, are for labor and material consumed within the last six months in the operation of the road, or are in the nature of trust funds, being "advance charges" due connecting lines, etc., and are therefore a lien upon the income of the leased property prior to the interest on any of its mortgage securities, it is expressly understood and agreed that in making
37 payments of the same, as herein stipulated, the second party shall become subrogated to all the rights of the present payees, and that all payments so made on these accounts, in excess of said credit, shall be repayable by the first party to the second party on demand with six per cent interest from the average dates of payments.

And in consideration of these premises, the sec- party hereby agrees as follows:

(1) That on the first day of July, 1892, it will take possession of said property, and thereafter maintain and operate the same during the continuance of this lease.

(2) That it will keep an accurate, true and separate account to which shall be credited all the gross earnings of the leased property, and against which shall be debited all expenses of operating, maintaining, repairing and renewing the leased property (including salaries of the officers and the expenses of perfecting, and maintaining

he organization of both parties), and the excess of gross earnings
ver said expenses, shall be considered for the purposes of this con-
ract as the "Net Earnings" of the leased property.

And it is mutually agreed that the second party shall appropriate
nd use the "Net Earnings" of the leased property as herein defined,
n payment of the cost of improvements and additions to said prop-
rty which shall be mutually agreed upon by the parties hereto
(unless the first party shall provide other funds for that pur-
38 pose); in payment of taxes assessed or accrued against said
property; also, as and when they become due, in payment
f the rentals, taxes and other payments, that the first party is or
nay hereafter become under obligations to pay on account of its
eased lines, and lines on which it has or may hereafter acquire the
ight to run its trains; also, as and when it becomes due, in payment
f interest, or rentals, which the first party is, or may hereafter be-
ome under obligations to pay on account of leased rolling stock; also,
s and when it becomes due, in payment of interest on the Priority
Loan of the first party, and interest on its floating debt including
the unpaid balance of any advances or loans made by the second
party; also in payment of said floating debt and advances.

So much of the balance of said "Net Earnings" for any half
year ending on the last day of June or December, remaining after
making or providing for the foregoing payments, as shall be neces-
sary to pay in full, one coupon on each of the First Mortgage Bonds
of the Minnesota and Northwestern Railroad Company, and the
Chicago, St. Paul & Kansas City Railway Company, now outstanding
or which may hereafter be issued with the consent of the second
party, shall be deemed available and shall be appropriated for the
payment of said coupons, and any surplus shall belong to the second
party.

On the first day of January and July of each year, or as soon
thereafter as the accounts can be made up, the amount thus
39 available for the payment of said coupons, shall be definitely
ascertained, and when so ascertained such amount shall be
set aside and held in trust by the second party for the equal and pro
rata benefit of the holders of said coupons, without discrimination,
except that said coupons shall be entitled to payment in the order in
which they shall become due; that is to say, all coupons maturing
on the first day of January, 1893, shall be entitled to be paid or pro-
vided for out of said trust fund, before any subsequent maturing
coupons shall be paid, and in the same manner all coupons maturing
on the first day of July, 1893, shall be paid or provided for out of
said trust fund, before any subsequent coupons shall be paid, and
so on.

Whenever and as often as a sufficient amount shall accumulate
in said trust fund to pay in full one coupon on each of said bonds,
the second party shall give public notice by publication in the usual
manner in the cities of London and New York, that at the place and
in the manner provided in said coupon, on a specified day, it will
pay said coupon, together with interest at the rate of five per cent
per annum on the amount of such coupon from the date of its ma-

turity to the specified day of payment. The amount thus paid, or provided to be paid, both for the amount of said coupons, and the interest thereon, as above specified, shall be debited to and deducted from said trust fund and thereafter the second party shall only be responsible for such balance of said trust fund, if any, as shall remain after making or providing for such payments The
40 coupons thus paid shall be cancelled and surrendered to the first party.

It is further understood and agreed that nothing in this contract contained shall by implication or otherwise, require the second party to pay any of the amounts hereinbefore specified to be paid, except as hereinbefore stated out of "Net Earnings," yet the second party may in its discretion, advance and pay at maturity or at any time thereafter, any coupon on said First Mortgage Bonds, in which case it shall be entitled to charge the amount so advanced against said trust fund hereby created and be entitled to repayment out of said trust fund before any payments shall be made therefrom of later maturing coupons, or coupons paid with such advances may be held uncancelled by the second party until a sufficient amount shall have accumulated in said trust fund to pay the same, with interest thereon as hereinbefore specified, when said payment and interest shall be debited to said trust fund and said coupons cancelled and delivered to the first party.

It is further understood and agreed that although under this contract the second party has the right to pay all of the floating debt of the first party, and reserve all of the advances which the second party may make to the first party hereunder, out of the "Net Earnings" of the first six months, yet it is agreed that without waiving any of its rights in this respect, the second party may, in its discretion, waive the payment of the whole or any portion of said
41 advances, during the first six months, thereby increasing the amount which will be available for payment of interest on the said First Mortgage Bonds at the end of said six months and that the first party may with the consent of the second party, renew from time to time, the whole or any portion of its floating debt (including advances by the second party), in which case the unpaid portion of said floating debt and advances and interest thereon, shall be payable out of the future "Net Earnings," and at all times have the same preference in respect to payment as hereinbefore expressed.

It is further understood and agreed that the accounts of the second party, so far as they relate to the operations of the leased property, and the appropriation of "Net Earnings," shall at all reasonable times, be open to the inspection of the proper officers of the first party, or by independent auditors appointed for that purpose by the Board of Directors of the first party.

And as a further consideration for said lease, the second party agrees that upon presentation within a reasonable length of time, at its office, or at its agency in the city of New York, it will purchase the Junior Securities before mentioned of the first party, by issuing to the holders thereof, in exchange therefor, its own securities upon the following basis:

(*a*) For each $1,000 of General Mortgage Bonds, it will give $1,080 of its Preferred Stock.

(*b*) For each $1,000 of Income Bonds, and $150 in cash, it will give $2,000 of its Common Stock and the amount of cash
42 payment in its Preferred Stock.

(*c*) For each share of Chicago, St. Paul & Kansas City Railway Stock and $15 in cash, it will give one share of its Common Stock, and the amount of cash payment in its Preferred Stock.

(*d*) It is understood and agreed that this exchange is to be made as of the date of July 1st, 1892, but that the exchange may be made at any time before said date, or on any first day of January or July, within a reasonable time thereafter, application having been made at least five days in advance, and that as to exchanges made prior to that date, there shall be allowed a discount at the rate of six per cent per annum on cash payments from the date of said payments up to July 1st, 1892, and that as to the exchanges which are made subsequent to July 1st, 1892, the cash payments shall be the amounts named, plus interest at the rate of six per cent per annum, from and after said July 1st, 1892, until the date of payments.

The second party covenants and agrees to keep the leased property in good repair, and from time to time renew the same, so that the property shall remain in substantially as good condition as at present; and that it will save the first party harmless from all claims, demands, and actions arising or growing out of the operation of the property during the term of this lease. And all payments made under this paragraph shall be considered as operating expenses.

43 It is understood and agreed that if the second party during the continuance of this lease, shall at the request of the first party make advances to said first party, or on its account, the amount thereof shall be chargeable to the first party, and the second party shall be entitled to retain interest thereon, at the rate of six per cent per annum, semi-annually, on the first days of January and July each year, until repaid, thereby reducing the amount of the balance of "Net Earnings" available for the payment of interest on the first mortgage bonds.

It is further understood and agreed that if at any time during the continuance of this lease, the leased property or any portion thereof, by legal proceedings or otherwise, should be taken from the possession of the second party, from and after that date, the rentals herein provided for to be paid by the second party shall cease, and if less than the whole shall be thus taken from its possession, then the rentals as to such portion shall cease.

And it is further agreed, that in case any difference shall arise between the parties with respect to the meaning of this contract, or the rights of either party growing out of the same, or any provision thereof, the said question of difference shall be finally conclusively settled between the parties by arbitration. Each party shall have the right to choose one arbitrator, and if either shall fail to exercise such choice within ten days after being requested in writing to do so by

the other party, the party so requesting arbitration shall
44 have a right to name an arbitrator on behalf of the other party. The two arbitrators chosen by the parties as aforesaid shall first select a third, and the three shall proceed to hear the parties, and hear, try and determine the said question of difference, and the determination in writing of said arbitrators or any two of them shall be conclusive and binding. And each of the parties hereto covenants and agrees with the other to abide by, do and perform each and every determination of arbitrators under this paragraph.

In witness whereof, each of the parties has caused this lease to be executed under its corporate seal and the hands of its president and secretary, the day and year first above written.

Executed in Duplicate.

CHICAGO, ST. PAUL & KANSAS CITY RAILWAY COMPANY.

By —— ——, *President.*

Attest:

—— ——, *Secretary.*

In presence of

—— ——.

—— ——.

CHICAGO GREAT WESTERN RAILWAY COMPANY.

By —— ——, *President.*

—— ——, *Secretary.*

In presence of

—— ——.

—— ——.

(Duly acknowledged.)

45 EXHIBIT "D."

Chicago, St. Paul & Kansas City Railway Company.

Report of Committee on Scheme of Reorganization.

In consequence of representations made by the management of the above company that they did not expect to be in a position to meet the Coupons on the First Mortgage Bonds of the Minnesota & North Western and Chicago, St. Paul & Kansas City Railroads maturing January 1, 1893, a conference of leading bondholders was summoned at the office of Messrs. Robert Benson & Co., on August 31st last. After an explanation from the chairman of the board and some discussion a committee was appointed to consider the position of the Railway Company and take steps with the object of permanently placing the credit of the concern on a sound basis. The committee consisted of the following gentlemen:

Mr. John S. Gilliat, M. P., of Messrs. John K. Gilliat & Co.

Mr. Frederick Pennington.

Mr. J. G. Sillem, of Messrs. Hope & Co., Amsterdam.

Mr. A. F. Wallace, of Messrs. Wallace Brothers.

The above committee, after giving full consideration to the
46 facts and evidence at their disposal, have arrived at the following conclusions:

That the above Railway Company cannot meet the interest on the above-mentioned bonds due January 1, 1893, nor so far as the committee are able to judge any interest whatever for some time to come and at the same time maintain the undertaking in full and proper efficiency for the reason that unless cash is otherwise provided it will be compelled to devote earnings to the payment of necessary capital expenditure. A re-organization of the company therefore appears to be imperative upon a basis which, while providing cash for necessary capital expenditure will leave net earnings available for interest or dividends.

That in the interests of all parties alike it is desirable that such a re-organization should be voluntarily and harmonious in order that the expense and delay of a receivership and re-organization under the authority of the American law courts should be avoided.

That such re-organization should limit fixed charges to such an amount as will give the Railway Company sufficient credit to enable it to raise money for the necessary capital expenditure on favorable terms but under proper control.

That the provision of a sum of money approximating $3,000,000 is required for the purpose of meeting liabilities incurred for increased facilities at various stations and for the better working of the line as well as for meeting the cost of further necessary improvements to the line and providing further facilities for its efficient working.

47 That the First Mortgage Bondholders and the General Mortgage Bondholders are entitled to preserve their respective priorities in future earnings.

That by the operation of the funding plan of three years ago the above two classes of bondholders have practically submitted to an assessment already and the Income Bondholders and Common Stockholders may fairly be called upon to contribute for the present necessities of the railroad.

That the control of the finance of the railroad should be assured to the present First Mortgage Bondholders or their representatives.

That with regard to a contention which has been raised respecting the relative values of the Minnesota & North Western and Chicago, St. Paul & Kansas City first mortgage bonds, the committee, after full consideration, are unable to recommend that any difference be made between these issues, which conclusion also seems to have been accepted by the respective holders when the funding plan was arranged three years ago. The prices paid for the bonds are a matter of market and other considerations into which they are unable to enter; the amount of the mortgage debt per mile is about the same if the respective annual payments due for leases and rentals are capitalized; the value of the traffic appears to be about equal and the relative selling value of the original sections very difficult to decide. But the Committee are distinctly of opinion that the value of each section is far greater combined than separated.

48 The Committee have had placed before them by different Bondholders various schemes of reconstruction and it has also been suggested that they should make enquiries among other matters as to the past history of the Railroad. The Committee feel, however, that such enquiry is not included in the duties for which they were appointed, but they take the present opportunity of stating that nothing has come before them to indicate the expediency of any such enquiry and the Committee themselves are fully satisfied in the matter.

For the purpose of facilitating a simple and inexpensive re-organization the Chicago Great Western Railway Company has been organized under the laws of the State of Illinois and a lease of the Chicago, St. Paul & Kansas City Railway has been made to the above Corporation, which is now operating the line.

The Committee having examined the terms of the lease recommended the approval of the provisions thereof subject to certain alterations which the Chicago Great Western Company are willing to accept. With these alterations the terms of arrangement will stand as follows:

1. The Chicago Great Western shall assume all obligations of the Chicago, St. Paul & Kansas City Railway ranking prior (see table annexed) to the First Mortgage Bonds.

2. The present authorized stocks of the Chicago Great Western Railway Company being:

49 $30,000,000 First Preferred Guaranteed 4% Dividend Stock.

$30,000,000 Preferred Stock.

$40,000,00 Common Stock.

The Company shall amend its Articles of Incorporation so as to create in lieu of the above the following classes and amounts of Stock to be issued as hereinafter provided:

$15,000,000 4% Debenture Stock, interest payable half-yearly in Gold.

$15,000,000 5% Preferred Stock A, dividend contingent on earnings, payable half-yearly in Gold.

$10,000,000 4% Preferred Stock B, dividend contingent on earnings, payable in Gold.

$30,000,000 Common Stock.

3. As to the Preferred Stock A, inasmuch as the financial year runs from 1st July to 30th June, and the net earnings are usually more in the half-year ending 31st December than in the half-year ending 30th June, the Company shall so soon as practicable make up an accurate statement of its earnings and expenses for each half-year and the balance of earnings over expenses shall be considered the net earnings of the Company for that half-year. Out of such net earnings in each half-year all prior charges and interest on the Debenture Stock shall be paid or provided for. The surplus in the half-year ending 31st December up to an amount sufficient to pay 2½% Dividend on the 5% Preferred Stock A shall be applied for that purpose and any further surplus shall be carried forward

50 to the next half-year: the ultimate balance of net earnings in each year ending 30th June after payment of interest on the

Debenture Stock and 5% on the Preferred Stock A being applicable to dividends upon the 4% Preferred Stock B and the Common Stock of the Company.

4. The Company shall secure payment of interest on the 4% Debenture Stock and dividends on the 5% Preferred Stock A by a Trust Deed and Agreement with the Trustee, which Trust Deed shall also provide that in case of liquidation the net assets of the Company shall be applicable to the payment in Gold of the Capital of the different classes of Stocks or Securities in the same order of priority as the interest or dividends on such Stocks or Securities are provided to be paid.

5. The Trust Deed shall provide that the holders of the Debenture Stock and the 5% Preferred Stock A at a joint meeting to be held annually shall select from their own number a Committee of not less than three or more than five Members, to be designated the Finance Committee of the Company, and this Committee shall exercise a general supervision and control of the finances of the Company. The Committee shall have authority to appoint an Accountant to examine and audit the accounts of the Company and if at any time a controversy should arise as to the amount of net earnings applicable to the payment of dividends on the 5% Preferred Stock A the decision of the said Committee shall be final and conclusive.

6. The Trust Deed shall provide for further issues of De-
51 benture Stock and 5% Preferred Stock A or either of such stocks but only with the consent of holders of a majority in amount of both classes of Stock collectively present in person or by proxy at a meeting called for the purpose of voting as to the issue.

7. The Trust Deed shall also provide that with the consent of holders of two-thirds in amount of these two classes of Stock collectively present at a like meeting Bonds or other Securities may be issued by the Company and made a charge upon the undertaking prior to the Debenture Stock or subordinate to the Debenture Stock but prior to the 5% Preferred Stock A as the case may require.

8. The Trust Deed shall further provide that whenever new issues of Stocks or Securities shall be made pursuant to the foregoing provisions the Finance Committee shall superintend or approve the sale of such issues and the appropriation of the proceeds thereof to the specific purposes for which they are authorized.

9. The Trust deed shall further provide that upon default of the Company to pay the interest upon the Debenture Stock or to appropriate the balance of net earnings in accordance with its agreement in payment of dividends upon the 5% Preferred Stock A the Trustees shall when so required by the Finance Committee appoint a Receiver to receive and apply the income and to manage the property under the direction of the Finance Committee acting as a quasi Board of Directors subject to the control of the holders of the De-
benture Stock and the 5% Preferred Stock A only the
52 holders of the subordinate Stocks during the time the Receiver is in control having no voice whatever in the management.

10. The Trust deed shall also provide that upon the Company

making good its default and if so required by the Finance Committee giving reasonable additional security against future default the Receiver shall be discharged and the possession and management of the Railway revert to the Company.

11. The holders of the Debenture Stock and 5% Preferred Stock A will be entitled to vote in the management of the Company in the same manner as the holders of any other classes of Stock.

12. The Chicago Great Western Railway Company shall offer:

(*a*) To the holders of the First Mortgage Bonds of the Minnesota & North Western and Chicago, St. Paul & Kansas City Railway Companies—

In exchange for each $1000 Bond with Coupon of January, 1893, and all subsequent Coupons.

$500 4% Debenture Stock entitled to interest from 1st July, 1892, and $600 5% Preferred Stock A entitled to dividend from 1st July, 1892.

(*b*) To the holders of the General Mortgage Bonds of the Chicago St. Paul & Kansas City Railway Company—

In exchange for each $1,000 Bond with Coupon of January, 1893, and all subsequent Coupons.

$1,000 4% Preferred Stock B.

(*c*) To the holders of the Income Bonds of the Chicago, St. Paul and Kansas City Railway Company an option for 60 days
53 after the scheme of re-organization has been accepted by a majority of the First Mortgage Bondholders to pay an assessment of 10% in cash on the nominal amount of their Bonds and to make over the Bonds in exchange for twice the amount of cash paid in 4% Preferred Stock B and twice the amount of the Bonds made over in Common Stock of the Chicago Great Western Railway Company. Holders failing to exercise this option or to pay the assessment within the time specified shall be entitled to exchange their income Bonds for 150% in Common Stock of the Chicago Great Western Railway Company.

(*d*) To the holders of the Common Stock of the Chicago, St. Paul & Kansas City Railway Company an option for 60 days after the scheme of re-organization has been accepted by a majority of the First Mortgage Bondholders to pay an assessment of 10% in cash on the nominal amount of their Common Stock and to make over the Common Stock in exchange for twice the amount of cash paid in 4% Preferred Stock B and an amount equal to the Stock made over in Common Stock of the Chicago Great Western Company. Holders failing to exercise this option or to pay the assessment within the time specified shall be entitled to exchange their Common Stock for half the amount in the Common Stock of the Chicago Great Western Railway Company.

13. The Finance Committee shall have the power to sell the forfeited Stock and 4% Preferred Stock B which the Income
54 Bondholders and Common Stockholders not paying assessment would have received if they had paid assessment for the benefit of the Chicago Great Western Railway Company.

14. The Finance Committee shall also have power to sell from

time to time not exceeding $2,000,000 additional of the Company's 4% Debenture Stock so as to provide for any future capital requirements in excess of the assessments on the Income Bonds and Common Stock.

15. The Leavenworth & St. Joseph Railway is now rented by the Chicago St. Paul & Kansas City Railway Company at $30,300 per annum and as this Railway connects two important points of that company's system and the rental is one of the prior charges on its undertaking the Chicago Great Western Railway Company shall be authorized to complete arrangements for the purchase of the Leavenworth & St. Joseph Railway for $500,000. The present owners of that Railway are also holders of about $10,000,000 Common Stock of the Chicago St. Paul & Kansas City Railway Company upon which they have already agreed to pay in the cash assessment in accordance with section (d) clause 12 hereof which will produce $1,000,000.

16. The Chicago Great Western Railway Company shall pay all the expenses of re-organization including reasonable remuneration for their services to the Committee and others engaged in carrying it into effect.

17. It shall be arranged that the cash received by way of assessment shall be paid into the Bank of England or the National Bank of Illinois in Chicago to the order of the Finance Committee.

The result may be tabulated as follows:

	Rolling Stock Lease Warrants.	Priority Loan.	4% Deb. Stock.	5% Pref. Stock A.	4% Pref. Stock B.	Common Stock.
	$	$	$	$	$	$
Assume all the Rolling Stock Lease Warrants	1,723,430					
Assume the Priority Loan		2,823,150				
Exchange $18,954,000 First Mortgage Bonds for			9,477,000	11,372,400		
Exchange $4,886,000 General Mortgage Bonds for					4,886,000	
Exchange $4,891,700 Income Bonds (all assessments paid or forfeited Stock sold) for						9,783,400
Exchange $14,892,900 present Stock (all assessments paid or forfeited Stock sold) for						14,892,900
For Cash assessment 10 p. ct. on $4,891,700 Income Bonds					978,340	
For Cash assessment 10 per cent. on $14,892,900 Stock					2,978,580	
Issue for any future Capital requirements in excess of assessments on Income Bonds and Stock			2,000,000			
Total assumed and New Issues..	1,723,430	2,823,150	11,477,000	11,372,400	8,842,920	24,676,300

56 Under this plan there will be available for payment of floating debt for capital expenditures and for purchase Leavenworth & St. Joseph Railway:

From assessments (and sale of forfeited Stocks if assessments are not paid)	$1,978,460
Deduct the cost of the Leavenworth and St. Joseph Railway	500,000
Leaves available for other capital expenditures and payments of floating debt	$1,478,460

And in addition the proceeds of $2,000,000 Debenture Stock.

The purchase of the Leavenworth and St. Joseph Railway will reduce the rentals by $30,300 and the payment of floating debt and extended rolling stock lease warrants mostly bearing 8% interest will reduce the prior annual charges by about $60,000 more.

On the basis of last year's net earnings this would give about $744,000 as applicable to interest and dividend.

The interest on $9,477,000 of 4% Debenture Stock (the amount given in exchange for the First Mortgage Bonds) is $379,080, leaving $364,920 for dividends on the 5% Preferred Stock A, or equal to about 3 1/10 per cent.

In making the above calculation the interest on the $2,000,000 4% Debenture Stock which is authorized to be issued and sold hereafter is not taken into consideration, for the reason that it does
57 not bear interest until sold, and it may be assumed that when sold its proceeds will be so appropriated as to increase the earning capacity of the undertaking by as much at least as the interest.

A large majority of the holders of General Mortgage Bonds having assented to the foregoing scheme and the holders of more than $10,000,000 of Common Stock having also assented and elected to pay in the proposed cash assessment amounting to over $1,000,000, the holders of Minnesota & North Western and Chicago, St. Paul & Kansas City First Mortgage Bonds and of the remaining General Mortgage Bonds, are invited to deposit their securities with the Merchants Trust Limited, 63, Cornhill, London, or with Messrs. Hope & Co., Amsterdam, or with Messrs. C. W. Benson & Co., St. Paul, to be dealt with in accordance with the provisions of the scheme.

And for the same purpose holders of the Common Stock and of the Income Bonds who have not already assented are invited to deposit their securities with the same depositories and signify whether they accept the option herein offered.

Cash assessments will be payable within 60 days after the scheme has been adopted by a majority of the First Mortgage Bondholders of which due notice will be given.

Certificates of Deposit will be issued pending the preparations of the securities for exchange.

Copy of the Articles of Incorporation of the Chicago Great Western Railway Company and proposed amendments thereof also copies

of the Lease of the Chicago St. Paul & Kansas City Railway
58 to the same Company and the Trust Deed as agreed upon can be seen at the offices of Messrs. Murray, Hutchins & Co., 11 Birchin Lane, London, E. C.

3rd October, 1892.

JOHN S. GILLIAT,
FREDERICK PENNINGTON,
J. G. SILLEM,
A. F. WALLACE,
Committee.

Exhibit E.

Chicago, St. Paul & Kansas City Railway Company
to
Chicago Great Western Railway Company.

Deed.

This Indenture, Made this seventh day of September, 1893, by and between the Chicago, St. Paul and Kansas City Railway Company, a corporation of the State of Iowa, party of the first part hereinafter called the Iowa Company and the Chicago Great Western Railway Company, a corporation of the State of Illinois, party of the second part hereinafter called the Illinois Company, Witnesseth:

Whereas, The Minnesota and Northwestern Railroad Com-
59 pany, a corporation of the State of Minnesota on and prior to the 8th day of December, 1887, owned a railroad extending from the City of St. Paul, State of Minnesota, in a southerly, southeasterly and easterly direction to Forest Home Junction, near the City of Chicago, State of Illinois; with a branch extending from Hayfield Station on its main line, in the County of Dodge, State of Minnesota, in a southerly direction to Manly Junction, in the County of Worth, State of Iowa; also with a branch extending from the station of Sumner, in Bremer County, State of Iowa, in a southwesterly and westerly direction to Hampton, in the County of Franklin, Iowa, formerly the Dubuque and Dakota Railroad; in all about five hundred and ten miles of single track railroad; also about four miles of double track from West St. Paul to South St. Paul, in the Counties of Ramsey and Dakota, in the State of Minnesota, which was incumbered by a certain mortgage known as the "First Mortgage," made by said company to the Metropolitan Trust Company of the City of New York and Robert H. Benson of London, Trustees, bearing date the first day of July, A. D. 1884, and securing bonds issued from time to time by said company, known and described in said mortgage as "First Mortgage five per cent Gold Bonds," and the amount of bonds outstanding and secured by said mortgage is the sum of nine million six hundred and twenty-eight thousand dollars par value, and

Whereas, The Iowa Company then owned a railroad ex-
60 tending from Oelwein Station, on the said railroad in Fayette County, Iowa, in a southwesterly direction to the City of Des

Moines in said State of Iowa, with a branch to Cedar Falls, Iowa, also branch to certain coal mines in said state, the main line having since been extended to the City of St. Joseph, in the State of Missouri, and

Whereas, in order to facilitate the operation of said railways, the said Minnesota and Northwestern Railroad Company on said 8th day of December, 1887, deeded to the said Iowa Company the railroad and other property it then owned, subject however to the lien of its first mortgage 5 per cent gold bonds which the Iowa Company assumed and agreed to pay.

And Whereas, The Iowa Company has issued from time to time under a certain mortgage or deed of trust dated the first day of July, 1886, to the Metropolitan Trust Company of the City of New York, and Robert H. Benson of London, England, certain bonds described in said mortgage or deed of Trust as first mortgage 5 per cent Gold Bonds amounting in the aggregate to nine million three hundred and twenty-six thousand dollars, which are now outstanding.

And Whereas the six coupons on both classes of said bonds maturing on the first day of January, 1890, up to and including the first day of July, 1892, both inclusive, amounting to $2,823,150 have not been paid, but by an arrangement with the holders have been funded and are now a liability of the Iowa Company known
61 as the "5 per cent Sterling Priority Loan."

And Whereas default was made in the payment of interest due January 1, 1893, on each class of said bonds, and each of the mortgages or deeds of trust which have been referred to contain an agreement that in event of default by the Railway Company in the payment of principal or interest of said bonds, or otherwise, a majority in interest of the bondholders for the time being shall have the right to agree upon a plan or scheme of re-organization, which plan or scheme when agreed upon in writing, and signified to the Trustees, shall govern their action thereafter, and shall be in all respects binding and obligatory upon all of the holders of said bonds.

And Whereas more than ninety-six per cent of the holders of said bonds have agreed upon a plan or scheme of re-organization in writing, and signified the same to the Trustees of each and both of the Mortgages or Trust Deeds mentioned, which plan or scheme provided:

That the Illinois Company should be organized under the laws of the State of Illinois with authority to issue:

$15,000,000 4 per cent Debenture Stock, interest payable half-yearly in Gold.

$15,000,000 5 per cent Preferred Stock A, dividend contingent on earnings, payable half-yearly in Gold.

$10,000,000 4 per cent Preferred Stock B, dividend contingent on earnings, payable in Gold.

62 $30,000,000 Common Stock.

And should assume all obligations of the Iowa Company ranking prior to the first mortgage 5 per cent gold bonds herein before mentioned.

That as to the Preferred Stock A, inasmuch as the financial year runs from 1st July to 30th June, and the net earnings are usually more in the half-year ending 31st December than in the half-year ending 30th June, the company shall so soon as practicable make up an accurate statement of its earnings and expenses for each half-year and the balance of earnings over expenses, shall be considered the net earnings of the company for that half-year. Out of such net earnings in each half-year all prior charges and interest on the Debenture Stock shall be paid or provided for. The surplus in the half-year ending 31st December up to an amount sufficient to pay 2½ per cent dividend on the 5 per cent Preferred Stock A, shall be applied for that purpose and any further surplus shall be carried forward to the next half-year; the ultimate balance of net earnings in each year ending 30th June, after payment of interest on the Debenture Stock, and 5 per cent on the Preferred Stock A, being applicable to dividends upon the 4 per cent Preferred Stock B, and the Common Stock of the Company.

That the company shall secure payment of interest on the 4 per cent Debenture Stock and dividends on the 5 per cent Preferred Stock A, by a Trust Deed and Agreement with the Trustee, which Trust Deed shall also provide that in case of liquidation the net assets of the company shall be applicable to the payment in
63 Gold of the Capital of the different classes of Stocks or Securities in the same order of priority as the interest or dividends on such Stocks or Securities are provided to be paid.

That the Trust Deed shall provide that the holders of the Debenture Stock and the 5 per cent Preferred Stock A, at a joint meeting to be held annually shall select from their own number a committee of not less than three or more than five members, to be designated the Finance Committee of the company, and this committee shall exercise a general supervision and control of the finances of the company. The committee shall have authority to appoint an Accountant to examine and audit the accounts of the company and if at any time a controversy should arise as to the amount of net earning applicable to the payment of dividends on the 5 per cent Preferred Stock A, the decision of the said committee shall be final and conclusive.

That the Trust Deed shall provide for further issues of Debenture Stock and 5 per cent Preferred Stock A, or either of such stocks, but only with the consent of the holders of a majority in amount of both classes of Stock collectively present in person or by proxy at a meeting called for the purpose of voting as to the issue.

That the Trust Deed shall also provide that with the consent of holders of two-thirds in amount of these two classes of stock collectively present at a like meeting Bonds or other Securities may be issued by the company and made a charge upon the under-
64 taking prior to the Debenture Stock or subordinate to the Debenture Stock, but prior to the 5 per cent Preferred Stock A, as the case may require.

That the Trust Deed shall further provide that whenever new issues of Stock or Securities shall be made pursuant to the foregoing

provisions the Finance Committee shall superintend or approve the sale of such issues and the appropriation of the proceeds thereof to the specific purposes for which they are authorized.

That the Trust Deed shall further provide that upon default of the company to pay the interest upon the Debenture Stock or to appropriate the balance of net earnings in accordance with its agreement in payment of dividends upon the 5 per cent Preferred Stock A, the Trustees shall when so required by the Finance Committee appoint a Receiver to receive and apply the income and to manage the property under the direction of the Finance Committee acting as a quasi Board of Directors subject to the control of the holders of the Debenture Stock and the 5 per cent Preferred Stock A only, the holders of the subordinate Stocks during the time the Receiver is in control having no voice whatever in the management.

That the Trust Deed shall also provide that upon the Company making good its default and if so required by the Finance Committee giving reasonable additional security against future default the Receiver shall be discharged and the possession and management of the railway revert to the Company.

That the holders of the Debenture Stock and five per cent Preferred Stock A will be entitled to vote in the management of the Company in the same manner as the holders of any other classes of stock.

That the Chicago Great Western Railway Company shall offer:

(*a*) To the holders of the First Mortgage Bonds of the Minnesota & Northwestern and Chicago, St. Paul & Kansas City Railway Companies, in exchange for each $1,000 Bond with Coupon of January, 1893, and all subsequent Coupons,

$500 4 per cent Debenture Stock entitled to interest from 1st July, 1892, and $600 five per cent Preferred Stock A entitled to dividend from 1st July, 1892.

(*b*) To the holders of the General Mortgage Bonds of the Chicago, St. Paul & Kansas City Railway Company—

In exchange for each $1,000 Bond with Coupon of January, 1893, and all subsequent Coupons, $1,000 four per cent Preferred Stock B.

(*c*) To the holders of the Income Bonds of the Chicago, St. Paul & Kansas City Railway Company an option for sixty days after the scheme of re-organization has been accepted by a majority of the First Mortgage Bondholders to pay an assessment of ten per cent in cash on the nominal amount of their Bonds and to make over the Bonds in exchange for twice the amount of cash paid in four per cent Preferred Stock B and twice the amount of the Bonds made over in Common Stock of the Chicago Great Western Railway Company. Holders failing to exercise this option or to pay the assessment within the time specified shall be entitled to exchange their Income Bonds for 150 per cent in the Common Stock of the Chicago Great Western Railway Company.

(*d*) To the holders of the Common Stock of the Chicago, St. Paul & Kansas City Railway Company an option for sixty days after the scheme of re-organization has been accepted by a majority of the First Mortgage Bondholders to pay an assessment of ten per

cent in cash on the nominal amount of their Common Stock and to make over the Common Stock in exchange for twice the amount of cash paid in four per cent Preferred Stock B and an amount equal to the Stock made over in Common Stock of the Chicago Great Western Railway Company. Holders failing to exercise this option or to pay the assessment within the time specified shall be entitled to exchanged their Common Stock for half the amount in the Common Stock of the Chicago Great Western Railway Company.

That the Finance Committee shall have power to sell the forfeited Stock and four per cent Preferred Stock B which the Income Bondholders and Common Stockholders not paying assessment would have received if they had paid assessment for the benefit of the Chicago Great Western Railway Company.

That the Finance Committee shall also have the power to sell from time to time not exceeding $2,000,000 additional of the Company's four per cent Debenture Stock so as to provide for any future capital requirements in excess of the assessments on the Income
67 Bonds and Common Stock.

That the Leavenworth & St. Joseph Railway is now rented by the Chicago, St. Paul & Kansas City Railway Company at $30,300 per annum and as this Railway connects two important points of that company's system and the rental is one of the prior charges on its undertaking the Chicago Great Western Railway Company shall be authorized to complete arrangements for the purchase of the Leavenworth & St. Joseph Railway for $500,000.

That the Chicago Great Western Railway Company shall pay all the expenses of reorganization, including reasonable remuneration for their services to the Committee and others engaged in carrying it into effect.

And Whereas, the plan or scheme of re-organization has been agreed to by the holders of more than ninety-six per cent of both classes of First Mortgage five per cent Gold Bonds hereinbefore mentioned and by the holders of more than ninety-nine per cent of the General Mortgage Bonds and by a majority of the holders of the Income Bonds and Stock of the Iowa Company; and

Whereas it is deemed desirable to convey the title of the property owned by the Iowa Company to the Illinois Company, subject however to the liens created by the First Mortgage hereinbefore mentioned and to the lien of a certain mortgage or deed of trust, called the "General Mortgage," bearing date the 1st day of January, 1889, executed by the Iowa Company to the Metropolitan Trust Company of the City of New York and Robert H. Benson, of
68 London, England, as Trustees to secure the payment of certain bonds therein described, of which there is now outstanding $4,886,000, and

Whereas the Iowa Company has legal authority to make such conveyance and the Illinois Company to accept the same; and

Whereas the holders of more than two thirds in amount of the Stocks of each company have duly and legally authorized such conveyance.

Now Therefore, in consideration of the premises and of the sum of one dollar to it in hand paid and the promises and agreements

hereinafter contained to be done and performed on the part of the Illinois Company, the Iowa Company does hereby grant, bargain, sell, assign, convey and transfer to the Illinois Company and to its successors and assigns forever, all and singular, the railroads and railways of the said party of the first part now constructed and in process of construction, together with all its franchises, rights of way, road-bed, bridges, culverts, viaducts, depots, shops, coal houses, warehouses, water tanks, stock yards, fences and other structures and buildings; all its engines, cars and rolling stock; all its office furniture and supplies; all its tools, machinery and implements; all its telegraph lines, wires and instruments; all its leases, contracts, rights, privileges and immunities; all its choses in action, accounts, bills, notes, stocks, bonds and moneys, and generally all its property, real, personal and mixed, of every kind, nature and description, as fully as if specifically enumerated herein, together with all
69 the tolls, incomes, issues, rents and revenues of said property, and all appurtenances thereto.

To Have and to Hold, unto the said party of the second part, its successors and assigns, forever, subject however to the lien created by the three mortgages or deeds of trust hereinbefore mentioned.

And as a further consideration for this conveyance, the Illinois Company hereby expressly agrees to and with the Iowa Company that it will, on presentation of any First Mortgage 5 per cent Gold Bonds which have not assented to the plan of re-organization issued by either the said Minnesota & Northwestern Railroad Company or by the Iowa Company, give its 4 per cent Debenture Stock and 5 per cent Preferred Stock A in exchange therefor in accordance with the plan, also that on presentation of any of the General Mortgage Bonds which have not yet assented to the plan it will give its 4 per cent Preferred Stock B in exchange therefor, also that on presentation of any of the Income Bonds or Stock which have not yet assented to the plan it will give $150 of its Common Stock in exchange for each $100 of Income Bonds and $50 of its Common Stock in exchange for each $100 of said Stock all in accordance with said plan or scheme of re-organization, but it is expressly understood and agreed that the Illinois Company does not assume any obligation in respect to said First Mortgage 5 per cent Gold Bonds or said General Mortgage Bonds, Income Bonds or Stock, except as herein stated.

70 As a further consideration for said conveyance, the Illinois Company hereby assumes and agrees to pay at or before maturity, the principal and interest of the 5 per cent Sterling Priority Loans of the Iowa Company, the principal sum being $2,823,150, also as and when they become due, the amounts payable by the Iowa Company to the Railway Equipment Company of Minnesota under two certain contracts for the leasing and purchasing of Railway Equipment, one of which is dated the 28th day of May, 1891, and the other the 6th day of December, 1891, which payments are represented by instruments in writing denominated in said contracts "lease warrants." And as a further consideration, the Illinois Company hereby covenants and agrees to and with the Iowa Company

to assume and pay all obligations of the Iowa Company not herein specifically mentioned.

It is mutually agreed that this deed shall not be construed as merging the whole or any part of the interest which the Illinois Company holds or may acquire as owner of either class of the bonds hereinbefore mentioned, but that such interest shall remain distinct and separate from the title hereby conveyed.

In Testimony Whereof, each party has caused its Corporate
71 seal to be hereto affixed and these presents to be signed by its President and Secretary the day and year first above written.

CHICAGO, ST. PAUL & KANSAS CITY RAILWAY CO.,
By ANSEL OPPENHEIM, *President.*

[CORPORATE SEAL.]

M. C. WOODRUFF, *Secretary.*
CHICAGO GREAT WESTERN RAILWAY COMPANY,
By JOHN M. EGAN, *President.*

[CORPORATE SEAL.]

R. C. WIGHT, *Secretary.*

Signed, sealed and delivered in presence of:
CHARLES NICHOLS,
GEORGE HUGHES MEAD.

(Duly acknowledged.)

(Title of Cause.)

Reply.

For its reply to the answer of the defendant herein, the plaintiff above named states and alleges:

I.

Plaintiff admits the enactment and approval (including the popular approval of the Act of 1903) of the various Acts of the Legislatures of the Territory and the State of Minnesota mentioned
72 and referred to in said answer, and as therein alleged, without, however, admitting that the meaning and effect of said laws or any of them was or is as alleged in said answer.

II.

Plaintiff denies that the Minnesota and Northwestern Railroad Company, or any or either of its alleged successors, the Chicago, St. Paul and Kansas City Railway Company, or the Chicago Great Western Railway Company, ever accepted and performed the conditions of the special Act of the Legislative Assembly of the Territory of Minnesota purporting to incorporate the Minnesota and Northwestern Railroad Company, and the subsequent Acts amendatory thereof and supplementary thereto.

III.

Except as the same admit the allegations of the complaint herein, plaintiff alleges that it has no knowledge or information sufficient to form a belief as to the other allegations and statements in said answer contained and therefore denies the same.

Wherefore, Plaintiff prays for judgment against defendant as is demanded in the complaint herein.

Dated September 7th, 1906.

EDWARD T. YOUNG,
Attorney General.
ROYAL A. STONE,
Assistant Attorney General, State Capitol, St. Paul, Minnesota.

73 (Title of Cause.)

Stipulation of Facts.

It is hereby stipulated and agreed by and between the parties to the above entitled action, that the following facts shall be taken and considered as proved and true upon the trial of this action:

The defendant the Chicago Great Western Railway Company is a corporation created and existing under the laws of the State of Illinois.

The defendant is the owner of a single line of railway running from St. Paul in the State of Minnesota, southward to and beyond the state line between Minnesota and Iowa, crossing the state line just south of Taopi. The Mason City & Fort Dodge Railroad Company owns a line of railway extending from Hayfield, in the County of Dodge and State of Minnesota, in a southwesterly direction to and beyond the south line of the State of Minnesota, which the defendant is operating in the usual manner as a common carrier of freight and passengers.

The gross earnings of the defendant for the year 1905 were $1,248,980.93 in the State of Minnesota, on which the defendant paid as a gross earnings tax, and the State Treasurer accepted, the sum of $24,979.62.

The territorial legislature of the Territory of Minnesota passed a special act entitled "An act to incorporate the Minnesota & Northwestern Railway Company," which was approved March 4th, 1854.

74 On the 16th day of February, 1855, the territorial legislature of the Territory of Minnesota duly passed an act entitled "A bill to amend an act entitled 'An act to incorporate the Minnesota & Northwestern Railroad Company,'" which was approved on the 17th day of February, 1855.

On the 21st day of February, 1855, the legislature of the Territory of Minnesota passed an act entitled "A bill supplementary to an act entitled 'An act to amend the Minnesota & Northwestern Railroad Company,'" which was approved on the 21st day of February, 1855.

The territorial legislature of the Territory of Minnesota also passed an act which was duly approved by the governor of said territory, entitled "An act supplementary to an act entitled 'An act to amend the Minnesota & Northwestern Railroad Company.'"

On the first day of March, 1856, the legislature of the Territory of Minnesota duly passed an act entitled "An act granting an extension of time to the Minnesota & Northwestern Railroad Company and for other purposes," which was duly approved by the governor on the first day of March, 1856.

On the 10th day of August, 1858, the legislature of the State of Minnesota duly passed an act entitled "An act to relieve the Minnesota & Northwestern Railroad Company," which was duly approved by the governor of said state on the 10th day of August, 1858.

On the 26th day of February, 1872, the legislature of the State of Minnesota duly passed an act entitled "An act to amend
75 the charter of the Minnesota & Northwestern Railroad Company," which was duly approved by the governor of said state on the 26th day of February, 1872.

On the 6th day of March, 1883, the legislature of the State of Minnesota duly passed an act entitled "An act to amend the charter of the Minnesota & Northwestern Railroad Company," which was duly approved by the governor of said state on the 6th day of March, 1883.

It is further stipulated and agreed that in determining this action each and all of the acts above described shall be referred to and considered in evidence the same as if they were duly offered and received in evidence and the contents of each and all of said acts were set out in full herein.

True copies of Sections 2 and 3, of Chapter 47, of the Laws of 1856, amending the charter of the Minnesota & Northwestern Railroad Company, the same being the act passed and approved March 1st, 1856, above referred to, are set out in the answer herein.

The Minnesota & Northwestern Railroad Company surveyed and began constructing a line of railroad from St. Paul, Minnesota, to the south line of the State of Minnesota in 1883, and completed the same and put it into operation for the transportation of freight and passengers on or about the first day of July, 1885.

On the 8th day of December, 1887, the Minnesota & Northwestern Railroad Company not only owned and operated the line of
76 railway from St. Paul to the south line of the State of Minnesota, but it also owned and operated a line of railway from said south line of the State of Minnesota through Oelwein, in the State of Iowa, to Dubuque, in the State of Iowa, and a corporation of the same name duly organized under the laws of the State of Illinois was the owner of a line of railway from Dubuque to Chicago in the State of Illinois, which latter corporation duly conveyed the same to the Minnesota & Northwestern Railroad Company of Minnesota heretofore referred to, by lease dated December 27th, 1886.

On the 8th day of December, 1887, the Chicago, St. Paul & Kansas City Railway Company, which was a corporation duly created and existing under and in accordance with the laws of the State of Iowa,

for the purpose of constructing and operating a railway, owned a line of railway extending from a connection with the line of railway above described at Oelwein, in the State of Iowa, in a southwesterly direction to the City of Des Moines, in the said State of Iowa, with a branch line to the City of Cedar Falls, Iowa, together with certain branch lines to coal mines in said State of Iowa, and it was at that time engaged in the construction of an extension of said line from the City of Des Moines in a southwesterly direction to the City of St. Joseph, in the State of Missouri.

Section 2036, of the Code of Iowa for 1897, which section was duly passed by the legislature of the State of Iowa in the year 1873, and duly approved by the governor of said state, and which
77 had been the law of said state since its passage, provides as follows:

"Any such corporation (meaning any corporation organized under the laws of this state for the purpose of constructing and operating a railway) may join, intercept and unite its railway with that of any other corporation at such point upon the boundary line of this state as may be agreed upon and with the consent of three-fourths in interest of all the stockholders, by purchase, sale or otherwise, may merge and consolidate the stock, property, franchises and liabilities of such corporations, making the same one corporation, upon such terms as may be agreed upon, not in conflict with the law."

On the 8th day of December, 1887, with the concurrence and approval of three-fourths of the stockholders of the Minnesota & Northwestern Railroad Company of Minnesota, and of the Chicago, St. Paul & Kansas City Railway Company, a contract was made and executed by said railway companies, a copy of which is attached to the answer herein, marked "Exhibit A," and made part hereof.

Under and pursuant to said contract "Exhibit A," on or about the 8th day of December, 1887, a deed was made from the said Minnesota & Northwestern Railroad Company to the Chicago, St. Paul & Kansas City Railway Company, a copy of which is attached to the answer herein, marked "Exhibit B," and made a part hereof.

Thereafter the Chicago, St. Paul & Kansas City Railway Company completed its line of railway to the City of St. Joseph, in the
78 State of Missouri, and the City of Kansas City, in the State of Missouri, and operated the same until consolidation with the Chicago Great Western Railway Company.

The Chicago Great Western Railway Company was originally incorporated under and by virtue of the laws of the State of Illinois in the year 1892.

The legislature of the State of Illinois, in the year 1885, duly passed an act which was duly approved by the governor of said state, and of which the following is a true copy:

"Be it enacted by the People of the State of Illinois, represented in the General Assembly: That all railroad companies now organized, or hereafter to be organized under the laws of this state, which now are, or hereafter may be, in possession of and operating in connection with or extension of their own railway lines, any other railroad or railroads in this state, or in any other state or states, or own-

ing and operating a railroad which connects at the boundary line of this state with a railroad in another state, are hereby authorized and empowered to purchase and hold in fee simple or otherwise, and to use and enjoy the railway property, corporate rights and franchises of the company or companies owning such other road or roads, upon such terms and conditions as may be agreed upon between the directors and approved by the stockholders, owning not less than two-thirds in amount of the capital stock of the respective corporations becoming parties to such purchase and sale; such approval may be given at any annual or special meeting, upon sixty days' notice being given to all shareholders of the question to be acted on, by publication in some newspaper published in the county where the principal business office of the corporation is situated; provided, that notice of any special meeting called to act upon such question shall be given to each shareholder whose postoffice address is known by depositing in the postoffice, at least thirty days before the time appointed for such meeting, a notice properly addressed and stamped, signed by the secretary of the company, stating the time, place and object of such meeting; and, provided, further, that no railroad corporation shall be permitted to purchase any railroad which is a parallel or competing line with any line owned or operated by such corporation."

79

The statute last above quoted has been ever since its passage and now is in full force and effect in said state.

Under and by virtue of the statutes of the State of Illinois, any railway corporation in Illinois was authorized to lease the line of railroad of any other railroad, either in Illinois or any other state or states. By the laws of the State of Iowa, any railroad company created and organized under and by virtue of the laws of the State of Iowa was authorized to lease its line of railway to any railway corporation created by or under the laws of any other state.

On the 13th day of June, 1892, the Chicago, St. Paul & Kansas City Railway Company duly made and executed with the Chicago Great Western Railway Company a lease of all its line of railway, a copy of which said lease is attached to the answer herein, marked "Exhibit C," and made a part hereof.

80

That the said lease marked "Exhibit C" was made pursuant to and under the authority of a resolution duly passed by the Board of Directors of the Chicago, St. Paul & Kansas City Railway Company at a meeting of said board duly called, which was held on the 22nd day of March, 1892, at eleven o'clock A. M., at the office of said company in St. Paul, Minnesota, which resolution reads as follows:

"Resolved that the president and secretary of this company be and hereby are authorized and directed to execute and deliver a lease, of which the following is a copy:

And be it further resolved, that a special meeting of the stockholders of this company be called to be held at the office of the company in the City of Dubuque, Iowa, on Monday, April 25th, 1892, at 9 o'clock A. M., for the purpose of ratifying and approving such lease."

Then follows in said resolution, and as a part thereof, a copy of

said lease which is identical with the copy of said lease which is attached to the answer herein and marked "Exhibit C."

That thereafter and on Monday, April 25th, 1892, at nine o'clock A. M., the stockholders of the Chicago, St. Paul & Kansas City Railway Company duly held a meeting in the City of Dubuque,
81 Iowa, which meeting was duly called, and at which there were present stockholders owning and representing 133,569 shares of the stock of said Railway Company out of a total of 145,569 shares of such stock entitled to vote at said meeting.

At said meeting of said stockholders the following resolution was unanimously adopted by said stockholders:

"Whereas, the Board of Directors of this company did, by resolution adopted at a meeting of said board, held in St. Paul, Minnesota, March 22nd, 1892, agree upon a lease of the property of this company to Chicago Great Western Railway Company in the form set forth and recorded on pages 66 to 71, inclusive, of this record, as the same has been read to this meeting, and,

Whereas, it is believed to be for the best interests of this company that its property be so leased to the Chicago Great Western Railway Company upon the terms and conditions set forth in said lease, therefore, be it

Resolved, that the form of lease above mentioned be approved, and that the action of the Board of Directors in relation to such leasing, and the form thereof, be and hereby are approved, ratified and confirmed, and that the President and Secretary of this company be and hereby are authorized, empowered and directed to execute said lease in the name of and on behalf of this company."

In the month of September, 1893, the Chicago Great Western Railway Company and the Chicago, St. Paul & Kansas City
82 Railway Company duly entered into and executed a contract and agreement, copy of which is set forth in the report of the committee of re-organization and in the deed made pursuant thereto from the Chicago, St. Paul & Kansas City Railway Company to the Chicago Great Western Railway Company, copies of which are attached to the answer and marked Exhibits "D" and "E," and made a part hereof. Said report, copy of which is attached to the answer and marked "Exhibit D," was duly made by a committee of the stockholders of the Chicago, St. Paul & Kansas City Railway Company on the 3rd day of October, 1892. Said deed, copy of which is marked "Exhibit E," and attached to the answer, was duly authorized by the Board of Directors and stockholders of, and executed and delivered by, the Chicago, St. Paul & Kansas City Railway Company to the Chicago Great Western Railway Company on the 7th day of September, 1893.

All of the original incorporators and persons named in Chapter 47, of the Laws of 1854, entitled "An act to incorporate the Minnesota & Northwestern Railroad Company," passed and approved by the legislature of the Territory of Minnesota on the 4th day of March, 1854, are dead

On file in the governor's office of the State of Minnesota, constituting a part of the records of that office, are certain letters and

documents, copies of which are hereto attached and marked Exhibits "F," "G" and "H."

"Exhibit F" is a letter dated New York, April 6th, 1854,
83 written by Edward Stearns, then Secretary of the Minnesota & Northwestern Railroad Company, to His Excellency Willis A. Gorman, then Governor of the Territory of Minnesota.

"Exhibit G" is a cerified statement, made December 17th, 1855, by Robert W. Lowber, who was then acting President of the Minnesota & Northwestern Railroad Company. Said statement was addressed to His Excellency Willis A. Gorman, who was then Governor of the Territory of Minnesota.

"Exhibit H" is a written statement, dated December 15th, 1856, made by the Minnesota & Northwestern Railroad Company to His Excellency Willis A. Gorman, then Governor of the Territory of Minnesota.

On file in the office of the Secretary of State of the State of Minnesota, constituting a part of the records of that office, are certain documents, copies of which are hereto attached and marked Exhibits "I" and "J."

"Exhibit I" is a written notice of acceptance of loan from the State of Minnesota, bearing date New York, May 24th, 1858, given by the Minnesota & Northwestern Railroad Company to His Excellency Henry H. Sibley, who was then Governor of the State of Minnesota. Said written notice was received by the Governor of the State of Minnesota on May 31st, 1858.

"Exhibit J" is a release, dated September 30th, 1858, made by the Minnesota & Northwestern Railroad Company to His Excellency Henry H. Sibley, who was then Governor of the said State
84 of Minnesota. Said release was filed in the executive offices of the State of Minnesota October 9th, 1858.

Attached hereto and marked "Exhibit K" is a copy of a letter dated April 18th, 1873, written by Willis A. Gorman, who was Governor of the Territory of Minnesota, from the year 1854 to the year 1858, inclusive, to Hon. W. R. Marshall, who was formerly Governor of the State of Minnesota.

Each and all of said Exhibits "F" to "K," inclusive, shall be considered in evidence in this case the same as if the originals thereof were duly authenticated and offered and received in evidence upon the trial of this action.

The capitol building of the State of Minnesota in which was then located the executive offices of said state and all the records of said offices was burned in 1881, and many records and executive and other documents, including both territorial and state records and documents, were destroyed by said fire.

Neither any Governor of the Territory of Minnesota, nor any Governor of the State of Minnesota, has at any time, by executive proclamation or otherwise, declared a forfeiture of the rights and franchises of the Minnesota & Northwestern Railroad Company, granted by any of the legislative acts mentioned in this stipulation, or of any of such rights and franchises. Neither the legislature of the Territory of Minnesota nor the legislature of the State of Minnesota has at any time by act, resolution, motion or otherwise, enacted

or declared the forfeiture of any of the rights and franchises granted to the said Minnesota & Northwestern Railroad Company in and by any of the said acts of the Territory of Minnesota
85 hereinbefore referred to. No action, suit or proceeding of any nature has at any time been brought in any court of the Territory or State of Minnesota or United States by either the Territory of Minnesota or State of Minnesota, or any official thereof, on their behalf, or by any person whatever, for the purpose of procuring a decree or judgment decreeing or declaring any such forfeiture, nor has any such judgment at any time been entered or obtained.

David L. Fuller, John R. Irvine, Louis Robert, Vetal Guerin and Charles Bazil are each and all dead.

Alexander Ramsey, Willis A. Gorman and Samuel Medary, who were all territorial governors, and the only governors of the Territory of Minnesota, are each and all dead.

Henry H. Sibley, Alexander Ramsey, Henry A. Swift, Stephen Miller, William R. Marshall, Horace Fosston, Cushman K. Davis, John S. Pillsbury, Lucius F. Hubbard and A. R. McGill are the names of all the governors of the State of Minnesota from the date of its organization as a state to the year 1888, and each and all of said persons are dead except Lucius F. Hubbard, who was Governor of said state from January 1st, 1882, to December 31st, 1886.

On the 27th day of December, 1883, at the office of A. B. Stickney, in the City of St. Paul, State of Minnesota, a meeting of the stockholders of the Minnesota & Northwestern Railroad Company was held, at which all of the stockholders of said company
86 were present. At said meeting twelve directors of said corporation were duly elected, and they were, at said stockholders' meeting, authorized to meet immediately and organize by electing officers and adopting by-laws for the government of the corporation and to transact such other business as might be brought before them.

The said stockholders' meeting then took a recess and the Board of Directors of the company immediately met in the same room and elected officers, viz.: A President, a Vice President, Secretary and Treasurer, and elected an executive committee consisting of five of said directors and a President ex officio. The Board of Directors at said meeting also adopted by-laws for the government of the corporation.

The stockholders of the Minnesota & Northwestern Railroad Company held meetings annually in each year after the year 1883, and until after the year 1895, and the Boards of Directors of the Minnesota & Northwestern Railroad Company met annually during the same period and annually elected officers and executive committees of said railroad company.

During the years 1885, 1886 and 1887 the Minnesota & Northwestern Railroad Company duly reported to the Railroad and Warehouse Commission of the State of Minnesota its gross earnings for each of said years, and the said Railroad and Warehouse Commission duly certified in each year to the State Auditor that such re-

port was made in such year, and filed in their office according to law, and that the tax upon the gross earnings reported in
87 each of said reports is two per centum, and in each case certified to the exact amount of such tax, and the respective amounts so certified were duly paid by the Minnesota & Northwestern Railroad Company to the State of Minnesota, and the same were duly accepted by the Treasurer of said state, which said amounts were received without objection and without any claim that the amount of said tax should have been computed at a higher or different rate than said two per centum on said gross earnings.

During the years 1888, 1889, 1892 and 1891 the Chicago, St. Paul & Kansas City Railway Company duly reported to the Railroad and Warehouse Commission of the State of Minnesota its gross earnings for each of said years, and the said Railroad and Warehouse Commission duly certified in each of said years to the State Auditor that such report was made in such year, and filed in their office according to law, and that the tax upon the gross earnings reported in each of said reports is two per centum, and in each case certified to the exact amount of such tax, and the respective amounts so certified were duly paid by the Chicago, St. Paul & Kansas City Railway Company to the State of Minnesota, and the same were duly accepted by the Treasurer of said state, which said amounts were received without objection and without any claim that the amount of said tax should have been computed at a higher or different rate than said two per centum on said gross earnings.

88 During the years 1892, 1893, 1894, 1895, 1896, 1897, 1898, 1899, 1900, 1901, 1902, 1903 and 1904 the Chicago Great Western Railway Company duly reported to the Railroad and Warehouse Commission of the State of Minnesota its gross earnings for each of said years, and the said Railroad and Warehouse Commission duly certified in each of said years to the State Auditor that such report was made in such year, and filed in their office according to law, and that the tax upon the gross earnings reported in each of said reports is two per centum, and in each case certified to the exact amount of such tax, and the respective amounts so certified were duly paid by the Chicago Great Western Railway Company to the State of Minnesota, and the same were duly accepted by the Treasurer of said state, which said amounts were received without objection and without any claim that the amount of said tax should have been computed at a higher or different rate than said two per centum on said gross earnings.

No objection was made by or on behalf of the State of Minnesota to the payment by the Chicago Great Western Railway Company and its predecessors of the two per cent gross earnings tax until the year 1905, when a four per cent tax was demanded, except that in the year 1897 the question of whether the said tax should be computed at the rate of two per cent or at the rate of three per cent was submitted to the Railroad and Warehouse Commission. The report of the said commission upon its disposition of the said question, together
89 with a copy of their opinion thereon, appears in its report to the Governor for the year 1898, on pages 8 to 13, inclusive.

to which reference may be made at any and all times during the course of this action, and the same may be considered in all things as if it were actually in evidence herein.

Nothing herein contained shall be construed to deprive either party of the right to object to any of the facts herein stipulated, upon the ground that the same or any thereof are immaterial or irrelevant. Neither shall any characterization of any law, instrument, action or proceeding herein used bind either party as to the legal effect of such law, instrument, action or proceeding, the same being left for determination by the court.

Dated March 2nd, 1908.

EDWARD T. YOUNG, *Att'y Gen.*,
R. A. STONE, *Attorneys for Plaintiff.*
DAVIS, KELLOGG & SEVERANCE,
ASA G. BRIGGS,
Attorneys for Defendants.

EXHIBIT "F."

NEW YORK, *6th April*, 1854.

To His Excellency Willis A. Gorman, Governor of the Territory of Minnesota.

SIR: I have the honor to transmit to you the acceptance of an act entitled "An Act to incorporate the Minnesota & North Western Railroad Company."

90

Very respectfully, y'r ob't serv't,

EDWARD STEARNS,
Sec'y of Corporation.

EXHIBIT "G."

To His Excellency Willis A. Gorman, Governor of the Territory of Minnesota.

SIR: The Minnesota & Northwestern Railroad Company have the honor to make the following statement:

First. The said company has not yet expended any sum whatever in the construction of the railroad contemplated in and by its charter, or in the machinery thereof, or the appurtenances belonging thereto.

Second. No sum whatever has been received by the said company during the present year.

Third. The said company has expended during the current year the sum of seven thousand nine hundred five dollars and twenty-six cents.

In witness whereof, the said company has caused this instrument to be signed by Robert W. Lowber, its acting President, and attested by its corporate seal this seventeenth day of December, eighteen hundred and fifty-five.

ROBERT W. LOWBER,
[SEAL.] *Acting President of the Minnesota and North Western Railroad Company.*

91 STATE OF NEW YORK,
City and County of New York, ss:

Robert W. Lowber, the acting President and Treasurer of the Minnesota & Northwestern Railroad Company, being duly sworn, says that the foregoing statement is in all respects correct and true.

ROBERT W. LOWBER.

Sworn and subscribed this 17th day of Dec., 1855, before me.

SAMUEL P. HYATT,
Comm. of Deeds.

EXHIBIT "H."

Statement made by the Minnesota & Northwestern Railroad Company to His Excellency Willis A. Gorman, Governor of the Territory of Minnesota, under and in accordance with the provisions of the charter of the said company and of the several acts amending the same:

The Minnesota & Northwestern Railroad Company has not expended any sum whatever in the construction of the railroad mentioned in the said charter; the machinery therefor or the appurtenances thereunto belonging, except for surveys and incidentals.

No amount whatever has been received by the said company within the present year, nor since the date of our last report to your Excellency.

92 The said company has expended, since the date of its last annual report and during the present year, the sum of twenty-six thousand six hundred and eighty-five dollars and seventy-seven cents.

In witness whereof, the said company has caused this instrument to be signed by Robert W. Lowber, its acting President, and the seal of said company to be hereto affixed, this thirteenth day of December, eighteen hundred and fifty-six.

ROBERT W. LOWBER,
[SEAL.] *Acting President of the Minnesota & Northwestern Railroad Company.*

STATE OF NEW YORK,
City and County of New York, ss:

Robert W. Lowber, acting President and acting Treasurer of the Minnesota & Northwestern Railroad Company, being duly sworn, says that the foregoing statement is, in all respects, correct and true, according to his best knowledge and belief.

ROBERT W. LOWBER.

Sworn to before me this 15th day of December, 1856.

SAMUEL P. HYATT,
Comm. of Deeds.

93 EXHIBIT "I."

Office of the Minnesota & Northwestern Railroad Company.

NEW YORK, *May 24th*, 1858.

To His Excellency Henry H. Sibley, Governor of the State of Minnesota.

SIR: In accordance with the provisions of the act of the Legislature of the State of Minnesota, approved March 9th, 1858, entitled "An Act proposing an amendment to Section ten, Article nine, of the Constitution, and providing for the submission of the same to the people," we, the Minnesota & Northwestern Railroad Company, respectfully notify you that we shall and do avail ourselves of the loan provided for in and by the said act, and hereby accept the conditions of the same.

We have the honor to be, with great respect,

Your obedient servants,

THE MINNESOTA & NORTHWESTERN RAILROAD CO.,
ROBERT W. LOWBER, *Acting President.*

[CORPORATE SEAL.]

Robert W. Lowber, acting President of the Minnesota and Northwestern R. R. Co., New York, May 24th, 1858.

Notice of acceptance of loan from State.

Received May 31st, 1858.

H. H. SIBLEY.

94 EXHIBIT "J."

This indenture, made and entered into this thirteenth day of September, one thousand eight hundred and fifty-eight, by and between the Minnesota & Northwestern Railroad Company of the first part, and His Excellency, Henry H. Sibley, Governor of the State of Minnesota, of the second part, witnesseth:

That the said parties of the first part for and in consideration of the sum of one dollar to them in hand paid by the said party of the second part, the receipt of which is hereby acknowledged, have released, and by these presents do release, to the said party of the second part, all the right, title, interest and claim which the said parties of the first part had on the tenth day of August, one thousand eight hundred and fifty-eight, or might or may thereafter acquire in and to any part or portion of the five million loan to railroads provided for by an amendment to the Constitution of the State of Minnesota, to have — to hold the same unto the said party of the second part, and his successors forever.

And for and in consideration as aforesaid the said parties of the first part have undertaken, promised, covenanted and agreed, and by these presents do undertake, promise, covenant and agree that they

will not, under penalty of a forfeiture of their chartered rights and privileges at any time claim or attempt to obtain any portion of the five million loan to railroads, provided for by an amendment
95 to the Constitution of the State of Minnesota, approved by the people of Minnesota April the fifteenth, eighteen hundred and fifty-eight.

In witness whereof, the parties to these presents have hereunto affixed their corporate seal, and have caused these presents to be subscribed by their President and Secretary the day and year first above written.

THE MINNESOTA & NORTHWESTERN RAILROAD COMPANY.

[CORPORATE SEAL.]

ROBERT W. LOWBER, *President.*
JONAS C. BUCKINGHAM, *Secretary.*

Signed, sealed and delivered in presence of
JOHN JAY HYDE.
CHARLES NETTLETON.

(Duly acknowledged.)

I hereby certify that this release was filed in the Executive Office of the State of Minnesota this ninth day of October, A. D. 1858, and recorded in Ex. Journal, pp. 57 and 58.

WM. F. WHEELER,
Private Secretary to the Governor.

96 EXHIBIT "K."

ST. PAUL, MINNESOTA, *April 18th*, 1873.

Hon. W. R. Marshall.

DEAR SIR: Yours of the 15th instant was duly received, by which you desire to know whether I recollect whether the "Minnesota & Northwestern Railroad Company" did duly accept said charter while I was Governor.

I answer that I have a distinct recollection that it was duly accepted, and the acceptance duly filed in my office as Governor, and by me placed with the Secretary of the then territory. I have every reason to remember it, as you know I vetoed the first charter and had bitter struggle to get the 3 per cent inserted, in lieu of taxation.

I am very respectfully,
Your Ob't Serv't,
(Signed) W. A. GORMAN.

Transcript.

(Title of Cause.)

This matter came on for trial before Hon. Oscar Hallam, J., without a jury, on the afternoon of March 3, 1908; Royal A. Stone and

George W. Peterson appearing as attorneys for the state, and Davis, Kellogg & Severance and Asa Briggs appearing as attorneys for the defendant.

Mr. STONE: We rest our case on the pleadings.

97 Mr. Severance opened the case on behalf of the defendant.

Mr. SEVERANCE: Now, in order to try this case as rapidly as possible, we arrived at a stipulation of the facts, except that each party is to be at liberty to supplement those facts, and they are offered subject to objections as to their materiality or relevancy.

(Mr. Briggs here read the stipulation of facts in full, which appears supra, and for that reason will not be repeated here. However, inasmuch as it is not set forth in full in the stipulation of facts, that portion of the report of the Railroad and Warehouse Commission for the year 1898, the same being referred to in the said stipulation and being a part of the evidence herein is herewith printed in full. The same appears on pages 8 to 13 of the report referred to.)

Excerpt from Report of the Railroad and Warehouse Commission for 1898.

"By Section 1679, of the General Statutes of 1894, it is made the duty of the Commission to certify to the State Auditor a statement of the gross earnings of railroad companies, together with a statement of the per centum and amount of tax due thereon.

A question arose last year as to the rate of taxation which should be certified to be paid by the Chicago Great Western Railroad Company. The Commission examined the matter very carefully,
98 and came to the conclusion that, under existing laws, the rate would have to be certified at 2 per cent. On account of the importance of the matter, and in order that the question might be properly submitted to the Legislature for its consideration, the Commission made and filed a formal decision on December 2, 1897. As the decision states with sufficient fullness existing legal difficulties, and suggests what legislation is required to remove the same, we refrain from further comment. The decision was as follows:

"Before the Railroad and Warehouse Commission.

In the Matter of the Certification of the Rate Taxation on the Gross Earnings of the Chicago Great Western Railway Company.

"The Constitution of the state was amended in 1871 by adopting what is known as Section 32 (*a*), of Article IV, thereof.

"By this amendment it was provided as follows:

"'Any law providing for the repeal or amendment of any law or laws heretofore or hereafter enacted which provides that any railroad company now existing in this state, or operating its road therein, or which may be hereafter organized, shall, in lieu of all other taxes and assessments upon their real estate, roads, rolling stock and other personal property, at and during the times therein specified, pay into

the treasury of this state a certain percentage, therein mentioned, of the gross earnings of such railroad companies now existing or
99 hereafter organized shall, before the same shall take effect and be in force, be submitted to a vote of the people of the state, and be adopted and ratified by a majority of the electors of the state voting at the election at which the same shall be submitted to them.'

"At the time this amendment was adopted there was no general legislation providing for a gross earnings tax, but such railroads as were paying a gross earnings tax in lieu of all other taxation were doing so under special charter provisions.

"By Section 1, of Chapter III., of the Special Laws of 1873, provision was made whereby the St. Paul, Stillwater & Taylors Falls Railroad Company was authorized, for considerations expressed in the act, and in lieu of all other taxation, to pay as taxes one per centum on the gross earnings of said railroad, during the first three years after January 1, 1872, the first payment to be made on the 1st day of March, 1873, or within fifteen days after the passage of the act, and during the next seven years, after the expiration of such three years, to pay into the treasury of the state, on or before the first day of March in each and every year, two per cent on its gross earnings, and from and after the expiration of ten years from January 1st, 1872, to pay three per cent on its gross earnings.

"Provision was made in the same section for ascertaining the gross earnings and giving the state a lien upon the railroad for the collection of the tax. Section 2 of the act authorized any railroad company owning or operating any line or lines of railroad in
100 the state to accept and become subject to the provisions of the act, and provided that, in case of payment of taxes in accordance therewith, such payments should commence from and after the first of March next after the completion of thirty miles of such line thereafter built, or of the entire line if it should be less than thirty miles in length.

"By section 1, of Chapter II., of the General Laws of 1887, it was provided as follows:

"'Any railroad company owning or operating, or which may own or operate any line or lines of railroad in this state *which has not accepted and become subject to Sections one and two of Chapter III., of the Special Laws of* 1873, *relative to taxation or some special act or acts relating to taxation of the company accepting the same*, shall become liable to pay and shall pay a percentage of its gross earnings in lieu of all other taxes, in accordance with the provisions of the chapter hereinbefore referred to.'

"The remaining section of the act relates to other matters.

"These acts were not submitted to a vote of the people, and hence there may be some question as to their validity, but for the present purposes they will be assumed to be valid as to all railroads to which by their terms they are applicable. There are no other laws of a general nature affecting the question before us. By referring to the words we have italicized it will be seen that the
101 acts in terms are not applicable to (1) those railroad companies which have accepted and become subject to the act

of 1873, and (2) to those railroad companies which have accepted and become subject to some special act or acts relating to taxation of the company accepting the same. Or, to state it the other way, all railroad companies which have not accepted and become subject to the act of 1873, or have not accepted and become subject to some special act relating to the taxation of the accepting railroad company, are within the terms of this act.

"It follows that railroad companies operating under special charters which contain provisions providing for the taxation of such companies, are not within the terms of the acts referred to, nor subject to taxation therein provided for, but must be taxed upon their gross earnings in accordance with their charters.

"The legislature of the Territory of Minnesota, by Chapter XLVII., of the laws of 1854, incorporated the Minnesota & Northwestern Railroad Company. This act was amended by three separate acts in 1855 (Chapter LVIII., Laws 1855; Chapter LII., Laws 1855; Chapter XX., Laws 1855), and by Chapter XLVII., Laws 1856.

"By Section one, of the Act of 1856, among other provisions, the time was extended for the building of the road contemplated by the charter, and the company was required to accept the provisions of the act, and it was declared that unless the company duly notified the governor of the territory of its acceptance on or before the
102 fourth day of July, 1856, the act should be null and void, and all its rights, privileges and franchises under its charter should be null and void, and the governor was required to issue his proclamation so declaring, to all persons concerned.

"There is no direct evidence that this act was accepted by the company, but there is indirect evidence that it was duly accepted; such as the statement of facts in the case of Minnesota & Northwestern Railroad Company v. Rice, 1 Minn., page 359 (original edition); a letter from Governor Gorman to Governor Marshall, written in 1873; the fact that no proclamation was made by the governor declaring a failure to accept and forfeiting its rights, and the fact that the company has always acted upon the assumption that it was duly accepted. In view of the destruction of many of the old records in the office of the Secretary of State in 1881, and of the lapse of time, these facts are sufficient to raise a presumption that the act was duly accepted.

Comanche Co. v. Lewis, 133 U. S. 198.
Bank v. Dentridge, 12 Wheaton, 29.
Androscoging Bridge Co. v. Bragg, 11 N. H. 103.
Astor v. New York, Arcade Railway Co., 48 Hun., 562.

"Section two, of the Act of 1856, was as follows:

"'In consideration of the grant of lands contemplated by the eighth section of the charter to said company, approved March 4, 1854, and of the extension of time to said company as herein
103 stated, and in further consideration of the restoration of all rights, powers and franchises to said company which may be supposed to have for any cause become forfeited to the Territory of Minnesota, said corporation binds and obliges itself to pay, or cause

to be paid, to the Territory or future State of Minnesota two per cent upon each dollar of the gross receipts, proceeds and income of said railroad, so far as the same may be received or due them on that part of said road lying within the limit of the Territory or future State of Minnesota, to be paid to the Treasurer of said territory or future state, annually, on the first day of January in each year, from and after the day when the cars shall commence running on any part of said road in said Territory or future State of Minnesota, and which proceeds shall be appropriated to the payment of the territorial or state government expenses, and such payments shall be in lieu of, and the company shall be exempt from the payment of any other imposts, taxes or dividends, any law to the contrary notwithstanding.'

"This section has not been changed or amended by any subsequent legislation. There was an amendment of the charter in 1858 (Chapter CCXXIV., Laws 1858), and the company was authorized to change its name in 1872 (Chapter CII., Laws 1872), but neither of those acts has any bearing on the present question, except as legislative recognitions of the continued existence of the corporation.

104 "The existence of the corporation was recognized again in 1883, by the passage of Chapter LXXXIII., of the Special Laws of that year.

"Between the act of 1883 and June 30, 1886, a company constructed and put in operation a line of road from St. Paul south to Lyle, Minn., and it afterwards constructed a line from Hayfield southeast to Dubuque, in Iowa. The Minnesota & Northwestern Railroad Company owned and operated these lines of road until December 8, 1887, when the Chicago, St. Paul and Kansas City Railway Company, an Iowa corporation, purchased the same and all the rights and franchises of the former company. January 2, 1892, the Chicago Great Western Railway Company was organized under the laws of Illinois for the purpose of reorganizing the Chicago, St. Paul & Kansas City Railway Company. Shortly afterwards the re-organization was perfected, and the lines, property and franchises of the Chicago, St. Paul & Kansas City Railway Company were formally transferred to the Chicago Great Western Railway Company, which is the legal successor through the Chicago, St. Paul & Kansas City Railway Company of all the property, rights and franchises of the Minnesota & Northwestern Railroad Company.

"From 1886 until the present time the Minnesota & Northwestern Railroad Company and its successors have paid a gross earnings tax of two per cent annually on the lines operated in Minnesota.

105 "If that company and its successors were liable to a gross earnings tax under the charter referred to, the rate paid has been the proper rate, but if liable under the general laws, one per cent should have been paid for the first three years, two per cent for the next seven years, and three per cent thereafter.

"It is now more than ten years since the road was put in operation, and the State Auditor and Treasurer raise the question as to whether the rate should not be increased to three per cent instead of two per cent as heretofore.

"The present company objects to an increase in the rate of taxation of three per cent, and bases its objection upon the ground that the charter provisions above referred to constitute a contract between the Minnesota & Northwestern Railroad Company and its successors on the one part, and the Territory and State of Minnesota on the other part, which contract it is claimed is equally binding on both parties, and which neither can change or modify without the consent of the other, and that such contract has not in fact been changed or modified by existing legislation.

"To the first of these propositions we cannot yield our assent. It is true that there have been cases determined in the federal courts and in the courts of last resort in some of the states which seem to support the contention of the company, but the proposition that the legislature can enter into a contract with an individual or a corporation by which the state is obliged forever to commute upon
106 a fixed basis its right of taxation without reference to the needs or necessities of government or to equality or uniformity of taxation, is one which the courts of this state must affirm before we, as public officers, possessing only quasi judicial functions, can assent to.

"There have been some cases in the Supreme Court of this state which are along that line, but in the comparatively recent cases of State v. Luther, 56 M., 156, on an application for a reargument, the court distinctly stated that the question was not before the court in that case, and that it did not intend to express or intimate any opinion upon the question whether an act providing for a commuted system of taxation of railroad property constitutes a contract between the state and the railroad company which cannot be repealed or amended.

"In our view this leaves the question open in this state; and if the objection was based upon that proposition alone we would deem it our duty to certify a rate of three per cent instead of a rate of two per cent in order that the question might be directly and authoritatively determined if the company should refuse to pay the increased rate.

"But the legislation to which we have referred, we are clearly of the opinion, has not had the effect to amend or modify the act of 1856, and until that act is amended or modified the company cannot be required to pay a higher rate than two per cent as a gross earnings tax.

"The attention of the next legislature should be called to
107 this question, in order, if so advised, that it may pass an act which, when approved by the people as provided in the Constitution, will require this railroad company to pay a tax upon its gross earnings of three per cent, which is the rate paid by all the other railroads in the state, and which presumably, would be its fair share of the public burdens.

"Until such a law is passed and becomes operative the rate of taxation on the gross earnings of the Chicago Great Western Railway Company will have to be certified at two per cent.

"KINGSLEY,
Commissioner."

Stipulation then proceeds: "Nothing herein contained shall be construed to deprive either party of the right to object to any of the facts herein stipulated, upon the ground that the same or any thereof are immaterial or irrelevant. Neither shall any characterization of any law, instrument, action or proceeding herein used bind either party as to the legal effect of such law, instrument, action or proceeding, the same being left for determination by the court."

An adjournment was here taken until the morning of Wednesday, March 4, at which time the trial proceeded.

Mr. STONE: At this time we object to each and all of the exhibits attached to the stipulation, and the introduction thereof in evidence, on the ground that the same are irrelevant, immaterial and not binding on the plaintiff.

Received subject to objection.

108 "Mr. BRIGGS: The defendant offers in evidence Defts. Exhibit 1; this is a mortgage made by the Minnesota & Northwestern Railroad Company to the Metropolitan Trust Company and Robert H. Benson, dated July 1st, 1884. It is not necessary to read it—simply introduced as referring to consolidation proceedings later.

Objected to as irrelevant and immaterial.

Received subject to objection.

Mr. BRIGGS: The defendant offers Defts. Exhibit 2, which is a mortgage from the Minnesota & Northwestern Railroad Company to the Metropolitan Trust Company, dated Dec. 1st, 1887.

Same objection and ruling.

Mr. BRIGGS: The defendant offers Defts. Exhibit 3, which is the original articles of incorporation of the Minnesota & Northwestern Railroad Company of Illinois.

Same objection and ruling.

Mr. BRIGGS: I will call attention to the fact that there are two corporations of the same name, one of Illinois and one of Minnesota.

Defendant offers Defts. Exhibit 4, which is a mortgage made by the Minnesota & Northwestern Railroad Company of Illinois, to the Metropolitan Trust Company and Robert H. Benson, dated December 27th, 1886. This is a mortgage made by the Illinois Company to secure bonds issued by the Minnesota Company.

Same objection and ruling.

Mr. BRIGGS: The defendant offers Defts. Exhibi- 5, which

109 is the original articles of incorporation of the Chicago, St. Paul & Kansas City Railway Company. Defendant offers Defts. Exhibit 6, which is a certificate of change in the articles of incorporation of the Chicago, St. Paul & Kansas City Railway Company.

Same objection and ruling to both Exhibits 5 and 6.

Mr. BRIGGS: The defendant offers Defts. Exhibit 7, which are the articles of incorporation of the Chicago Great Western Railway.

Received without objection.

Mr. BRIGGS: The defendant offers Defts. Exhibit 8, which is an amendment to the articles of incorporation of the Chicago, Great Western Railway Company.

Received without objection.

Mr. BRIGGS: The defendant offers Defts. Exhibit 9, which is another amendment to the articles of incorporation of the Chicago Great Western Railway.

Received without objection.

Mr. BRIGGS: Defendant offers Defts. Exhibit 10, which is a contract or lease made by the Minnesota & Northwestern Railroad Company of Illinois to and with the Minnesota & Northwestern Railroad Company of Minnesota.

Objected to as irrelevant and immaterial.

Received subject to objection.

Mr. BRIGGS: The defendant offers Defts. Exhibit 11, which is a deed from the Minnesota & Northwestern Railroad Company of Illinois to the Chicago Great Western Railway Company.

110 Same objection and ruling.

Mr. BRIGGS: Merely for the sake of order, I want to call attention at this point to the contract which is attached to the answer and marked Exhibit "A." I won't offer it again, but so that the record will show all along in the regular order. For the same purpose I call attention to the deed which is attached to the answer, and marked Exhibit "B" in this action. I got a little ahead of myself when I called attention to these contracts. They should have succeeded these two mortgages I am about to offer. The defendant offers Defts. Exhibit 12, which is a mortgage from the Chicago, St. Paul & Kansas City Railroad Company to the Metropolitan Trust Company of New York and Robert H. Benson.

Objected to as irrelevant and immaterial.

Received subject to objection.

Mr. BRIGGS: The defendant offers Defts. Exhibit 13, which is a general mortgage from the Chicago, St. Paul and Kansas City Railway Company to the Metropolitan Trust Company and Robert H. Benson.

Same objection and ruling.

Mr. BRIGGS: The defendant offers Defts. Exhibit 14, which is a contract between the Minnesota & Northwestern Railroad Company of Minnesota and the Chicago, St. Paul & Kansas City Railway Company, relating to operation and traffic.

Same objection and ruling.

Mr. BRIGGS: The defendant offers Defts. Exhibit 15, con-

111 tract between the Chicago, St. Paul & Kansas City Railway Company and the Metropolitan Trust Company, dated December 8th, 1887.

Same objection and ruling.

Mr. BRIGGS: I call attention in this connection to the report of the Committee on Scheme of Reorganization, copy of which is attached to the answer and marked Ex. D. I call attention next to the deed from the Chicago, St. Paul & Kansas City Railway Company to the Chicago Great Western, dated December 7, 1893, copy of which is attached to the answer and marked Ex. E.

The defendant offers Defts. Ex. 16. This is a trust deed from the Chicago Great Western Railway Company to the Manhattan Trust

Company, dated November 2, 1892, executed in connection with the reorganization.

Same objection and ruling.

Mr. BRIGGS: We offer Defts. Ex. 17. This is an answer filed by the Minnesota & Northwestern Railroad Company in the District Court, Goodhue county, First district of the Territory of Minnesota, in the case of the United States of America against the Minnesota & Northwestern Railway Company. This relates entirely to the acceptance of the charter.

Objected to as irrelevant, immaterial and not binding on the plaintiff.

Received subject to objection.

Mr. BRIGGS: I will read this in full, because it is part of the original records in the clerk's office in Goodhue county, and I promised to return it.

112 "Territory of Minnesota, District Court, First District, Goodhue county. The United States of America v. The Minnesota & Northwestern Railroad Company. The answer of the above named defendant to the complaint of the plaintiff in this action respectfully says to this court that before the commission of the acts complained of in said complaint, or either of them, to-wit, on the 4th day of March in the year 1854, an act was passed by the legislature of the Territory of Minnesota, and approved by the Governor thereof in the following words and figures, that is to say"— Now, there won't be any use of reading that in, but I will state that it appears in the complaint as a printed copy of the act of 1854, incorporating the Minnesota & Northwestern Railroad Company of Minnesota, which was approved March 4, 1854, and entitled "An act to incorporate the Minnesota & Northwestern Railroad Company," heretofore introduced in evidence. "Which act has not been repealed nor modified, but at the time of the alleged trespasses and each of them was and now is in full force. That after the passage and approval of said act as aforesaid and on the first Tuesday in the month of April, 1854, being the month next succeeding that in which the said act above mentioned was passed, and not less than thirty nor more than sixty days after such passage, the corporators named in the first section of said act met in the City of New York, at the room of the Chamber of Commerce, in the Merchants' Exchange, being the first meeting of

113 the said corporators, and then and there determined that they would and then did accept the said charter, and immediately and upon the same day gave notice of such acceptance to the then governor of the Territory of Minnesota by certificate to that effect signed by the corporators present at the meeting, but not under seal, properly addressed to His Excellency, Willis A. Gorman, Governor of the Territory of Minnesota, at St. Paul, Minnesota, where the said governor then resided, and deposited it upon the same day in the postoffice in the City of New York; and that at the same the first meeting the said corporators made such arrangements as were proper and necessary for the future meetings of the organization of said company and the issue of the capital stock, that is to say, the said corporators then and there appointed a committee consisting of three

of their names, to-wit, Alexander Ramsey, George W. Billings and C. B. Raymond, and authorized and empowered the said committee to open books for subscription to $1,000,000 of the capital stock of the said company, to be opened at the office of Borup & Oakes, in the city of St. Paul, and at the Bank of the Republic, in the city of New York, on the first day of May, 1854, and to receive such subscriptions, and an installment of ten per cent upon each share, and give twenty days notice thereof in two public newspapers printed in said city of New York, and in the said city of St. Paul. And at the same time further authorized and empowered said committee to call further meetings of the said corporators and of the persons who should become subscribers to the capital stock of the said com-
114 pany. That on the said first day of May, 1854, the books of subscription to the capital stock of said company were opened by and under the direction of the said committee at the office of Borup & Oakes, in the city of St. Paul, and at the Bank of the Republic, in the city of New York; that after the opening of the said books as aforesaid, and on or about the 20th day of May, 1854, subscriptions were duly made upon the said books at St. Paul to the amount of $200 and $20, being ten per cent. of the amount of the said subscriptions which was at the time of the making thereof duly paid by the said subscribers to the said committee. That afterwards and on the 29th day of June, 1854, an act was passed by the Congress of the United States, and duly approved by the President thereof, and became and was and now is a law in the following words, that is to say"— Then follows in the answer printed copy of the act of the Thirty-third Congress, entitled "An act to aid the Territory of Minnesota in the construction of a railroad therein," which act was approved June 29, 1854. "That after the passage of the act last above mentioned, and on the 30th day of June, 1854, subscriptions to the capital stock of the said railroad company were duly made upon the said books which had been opened in the city of New York as aforesaid to the amount of $1,000,000, and an installment of 10 per cent upon each share of the stock so subscribed was at the time of the making of such subscription duly paid to the persons making the same to the said committee. That after
115 the said subscriptions had been made and the said installment had been paid as aforesaid, and on the 1st day of July, 1854, all the persons who had subscribed to the capital stock of the said company upon the books so opened in the city of New York met together in the said city in pursuance of notice previously given by said committee, proceeded to and did elect twelve stockholders of the said railroad company who were citizens of the United States of America, and three of whom then resided in the said Territory of Minnesota, to be directors of the said company. And that immediately thereafter and upon the same first day of July, 1854, the said directors so elected proceeded to and did organize by the election of a President and other officers, and then and there duly elected a President, Vice President, Secretary, Treasurer and Counsellor of the said company, and that within ten days thereafter each and all of said officers so elected duly accepted their said several offices and respectively

entered upon the discharge of the duties thereof. That afterwards and on the 10th day of October, 1854, these defendants caused a survey to be made of the said route of the railroad contemplated by and mentioned in the said act of the legislature of the Territory of Minnesota and located said railroad upon a route commencing at a point upon the southern line of said territory, between ranges 9 and 17, designated by the Board of Directors of said company, with reference to the best route to the city of Dubuque, thence running to and crossing the Mississippi river at St. Paul, thence by the most
116 practicable route to and by way of St. Anthony to the eastern line of the said territory in the direction of Lake Superior, and thence to a point on the northwest shore of Lake Superior in Minnesota territory north of the St. Louis river, opposite the entrance of the Lafond (?) river, into Lake Superior, and near the mouth of the St. Louis river, Minnesota, on Lake Superior, being the same railroad route contemplated by and mentioned in the said acts of Congress and the said territorial legislature, and so located the same that such location conformed in all respects to the route designated by the said acts of Congress and by the said act of the territorial legislature. That such location was made between St. Paul and the southern line of said territory, that the said railroad is located upon, over, across and includes the land upon which the alleged trespassing in the complaint mentioned in this action was therein stated to have been committed, and said land being the portion of the section granted to the Territory of Minnesota in and by said act of Congress. That after such survey and location were made as aforesaid and on the 12th day of October, 1854, and divers other times between that day and the day of the commencement of this action the defendants by and with the necessary agents, officers and servants did go upon that part of the tract of land mentioned and described in the complaint in this action, upon and over which the said railroad is and was located as aforesaid, and upon no other part of the said land for the purpose of constructing the said railroad as the defend-
117 ants lawfully might do, and then and there, within the necessary and proper width of the track of the said railroad as they had the lawful right to do, did cut down and prostrate the trees in the complaint in this action mentioned and carefully remove the same from the said track, doing no unnecessary damage to the plaintiff; such cutting down, prostration and removal being incident and necessary to the construction of the said railroad, and that such cutting down, prostration and removing and no other are the several supposed trespasses in the complaint mentioned. (Signed) Rice, Hollands-head & Becker, attorneys for defendant.

Mr. STONE: We would like to have it appear in the record that this answer is not verified by anyone.

Mr. BRIGGS: The defendant offers the record in the case of the United States, plaintiff, v. The Minnesota & Northwestern Railroad Company, appellees, as shown by the report thereof in the first volume of Minnesota Reports, original edition, and found on pages 127 to 133 of that report.

Objected to as irrelevant, immaterial and not binding on the plaintiff.

Received subject to objection

Mr. BRIGGS: I will read, now, just one paragraph which refers to the answer and the opinion, and save time by reading it all into the record at this time.

"The answer admits the commission of the acts complained
118 of, but justifies under the act of the Territorial Legislature of Minnesota, approved March 4, 1854, by which the defendant was incorporated and endowed with any lands which Congress might thereafter grant to the territory for the purpose of aiding in the construction of a railroad between the points indicated in the act of incorporation, and the Act of Congress, approved June 29, 1854, entitled "An act to aid the Territory of Minnesota in the construction of a railroad therein," alleging a free compliance with the provisoins of the act of incorporation, and the acts complained of were done in the location of the road contemplated by the charter of 4th March, 1854.

"The reply alleges that after the directors and officers of the defendant were elected and entered upon the discharge of their duties, and before the trespasses were committed to-wit, on the 4th day of August, 1854, the act of Congress, dated June 29, 1854, was repealed by act of Congress." A demurrer was interposed to this reply.

The COURT: What is the date of this answer that you read into the record?

Mr. BRIGGS: The answer isn't dated; there is no date of filing, but the summons was dated October 23, 1854.

Mr. SEVERANCE: Service was accepted on the same day by the defendant, October 23, 1854, by John M. Barbour, agent of the Minnesota & Northwestern Railroad Company.

Mr. BRIGGS: Perhaps, for the purpose of getting at that
119 date, we better offer the decision of the District Court on the demurrer, which is dated November 4, 1854.

Objected to as irrelevant and immaterial.

Received subject to objection.

Mr. BRIGGS: The defendant offers the record in the Supreme Court of the State of Minnesota, in the case of the Minnesota & Northwestern Railroad Company v. Rice, as found on pages 358 to 361, inclusive, of volume one, of the original R-ports of Minnesota.

Objected to as irrelevant, immaterial and not binding on the plaintiff.

Received subject to objection.

Mr. BRIGGS: There isn't very much of this, and I will read it all.

"The Minnesota & North Western Railroad Company, appellant, v. Edmund Rice, respondent. Appeal from the District Court of Dakota County.

"Edmund Rice, the plaintiff in the court below, brought suit in the District Court of Dakota County, against the defendants, 'The Minnesota & North Western Railroad Company,' for trespass upon certain lands in said county belonging to the plaintiff, and for cutting down and carrying away certain trees from off said lands, for which he claims damages in the sum of $2,200." I might say that this was decided at January, 1857, term of the Supreme Court.

"The defendants, in their answer, set forth the act of the legis-

lature of the Territory of Minnesota, entitled 'An act to incorporate the Minnesota & North Western Railroad Company,' ap-
120 proved March 4, 1854, and state that at the time of the alleged trespasses, said act was in full force, and that the said company has duly accepted the said charter and given notice thereof to the Governor of the territory; that they had opened books and received subscriptions to the capital stock of said company, of which ten per cent had been paid.

The defendants further set forth in full the act of Congress, entitled "An act to aid the Territory of Minnesota in the construction of a railroad therein," approved June 29, 1854. That afterwards, the said defendants had fully organized by the election of directors, etc., as required by the said charter.

They further set forth in their answer, "An Act to amend an act entitled an act to incorporate the Minnesota & North Western Railroad Company," which act was passed by a two-thirds vote in both branches of the territorial legislature, February 17, 1855.

"Also, 'An Act granting an extension of time to the Minnesota & North Western Railroad Company, and for other purpose,' approved March 1, 1856." That is the act in which the two per cent provision appears.

"The defendants further state that this last act was duly accepted by said company, and notice of such acceptance given to the Governor, and that on the 20th day of October, 1855, and while the parcels of land upon which the trespasses mentioned in the complaint are therein alleged to have been committed, were the prop-
121 erty of the government of the United States, and the said defendants had caused a survey of the route of said railroad to be made, within the limits of the route contemplated by said act of Congress and of the territorial legislature, and had located said route between St. Paul and the southern line of said territory; and that the same passed over and across the property upon which said trespasses are alleged to have been committed.

"That the said parcels of land being parts of sections designated by an odd number, upon the line of said road, were, at the time of said survey and location, portions of sections granted to said territory by said act of Congress. That the plaintiff has purchased and entered said lands of the United States government on the 1st day of January, 1856, and long after such location and survey.

"And the defendants justify the alleged trespasses mentioned in the complaint, as being incident and necessary to the construction and location of said railroad, and aver that they had the lawful right to enter said lands, and cut down and carry away the said trees from the track of said road.

"The plaintiffs, in their reply, allege that after the officers and directors of said company were elected and had entered upon the discharge of their duties, but before said trespass was committed, to-wit, on the 4th day of August, 1854, the said act of Congress referred to in the answer was repealed by an act of Congress entitled 'An Act for the relief of Thomas Brannaugh, and for the
122 repeal of the act to aid the Territory of Minnesota in the construction of a railroad therein.'

"The defendants demurred to this reply, because the act of Congress therein set forth is void and of no effect so far as it relates to the repeal of the act approved June 29, 1854, set forth in the answer.

"The District Court (Judge Chatfield) overruled the demurrer, and judgment was afterwards entered in favor of the plaintiff, the damages to be assessed by a writ of inquiry.

"The defendants appealed to the Supreme Court."

Then follows the points and the authorities, and the opinion finally finishes in this way: "The judgment of the District Court was reversed. (No opinion on file.)"

Mr. BRIGGS: We have the reports of the Appellate Court of Illinois and the Illinois Supreme Court—three cases—we desire to offer in evidence to show the law of Illinois.

Mr. STONE: We object simply on the ground that they are irrelevant and immaterial.

Received subject to objection.

Mr. BRIGGS: The defendant offers the records of the Appellate Court of Illinois, found on pages 327 to 336, inclusive, in reporting the case of the Chicago, Santa Fe & California Railway Company v. Mary L. Ashling, administratrix, and so on, construing the statutes in said State of Illinois referred to in the stipulation which was read yesterday in this case; volume 56.

123 Objected to as irrelevant and immaterial.

Mr. BRIGGS: The defendant also offers the records of the Supreme Court of the State of Illinois, in which this same case was affirmed upon appeal. These records and report are found on pages 373 to pages 385, inclusive, of volume 160 of the Illinois Reports.

Same objection and ruling.

Mr. BRIGGS: I also offer the record in the Appellate Court of Illinois, of the case of Chicago & Joliet Electric Railway Company v. Mathilda S. Ferguson, found on pages 356 to 360, of volume 106. This case also describes the statutes of Illinois which are referred to in the stipulation that was read in this case yesterday.

I will state this as a stipulation between the parties: It is stipulated that each of the deeds, mortgages, contracts and other instruments and documents which have been offered in evidence were executed and delivered pursuant to the authority duly given by the stockholders and boards of directors of the corporations who are parties hereto. It is also stipulated that the bonds which said mortgages were given to secure were all duly issued and sold pursuant to the authority therefor duly given by the stockholders and directors of the corporations which executed the mortgages; said bonds were afterwards duly paid and said mortgages satisfied.

124 ROBERT C. WIGHT, sworn on behalf of defendant, testified:

By Mr. BRIGGS:

Q. Mr. Wight, what is your occupation?
A. Secretary of the Chicago Great Western Railway Company.
Q. How long have you been connected with that railway?

A.. With the Great Western?
Q. Yes.
A. Since its organization.
Q. What was your occupation before the organization of the Chicago Great Western Railway?
A. I have been with Mr. Stickney as his private secretary since 1882.
Q. And you are familiar with all the matters that have taken place and the business that has been transacted in the President's office of the Minnesota & Northwestern Railroad Company, Chicago, St. Paul & Kansas City Railway Company and the Chicago, Great Western Railway Company since 1882?
A. Yes, sir.
Q. You were the Secretary of those other companies as well as of the Great Western?
A. I have been Secretary at different times. I haven't always been so, but I have always had charge of the records; most of the records you will find are written in my handwriting.

Q. Have you any records of transfer of stocks of the Min-
125 nesota & Northwestern Railroad Company in your possession?
A. Yes, sir.
Q. Have you them here?
A. Yes, sir.

Defendant's Exs. 19, 20, 21 and 22 offered and received in evidence without objection.

Defendant's Ex. 23, being an assignment of certain shares of stock of the Minnesota & Northwestern Railroad Company, offered in evidence.

Mr. STONE: I don't want to object, Mr. Briggs, but I suggest you identify these instruments a little more.

Q. I call your attention to Ex. 23, and ask you what that is and where it came from?
A. It was turned over to Mr. Stickney by Governor Marshall at the time Mr. Stickney bought the stock of the road from Governor Marshall.
Q. Governor Marshall was interested as a stockholder?
A. You will find by subsequent transfers that he and B. S. Cook owned it at the time Mr. Stickney bought it in 1883.
Q. Referring to Exs. 19 to 23.
A. Same way.

Mr. STONE: And they have been in your possession ever since, as Secretary or record keeper of the various companies?
WITNESS: Yes, sir.

Mr. BRIGGS: John M. Barbour is the same man who was agent of the Minnesota & Northwestern Railroad Company, and ad-
126 mitted service of the summons and complaint in 1854, in the Goodhue county case.

Q. I call your attention to Def't's Ex's 24 to 36 and ask you what those papers are and how they came into your possession.

A. They were turned over to me the same time as the other transfers and subscriptions I testified to, they all came together.

Q. As part of the records and papers of the Minnesota & Northwestern Railroad Company?

A. Yes, sir.

Q. Been in your possession ever since?

A. Yes, sir.

Mr. STONE: By whom were they turned over to you?

WITNESS: Governor Marshall and B. S. Cook.

Def't's Ex's 24 to 36, inclusive, offered in evidence.

By Mr. SEVERANCE:

Q. They cover all the stock outstanding at the time you acquired the stock from Governor Marshall?

A. Yes, sir.

Q. All the stock of the Minnesota & Northwestern Railroad Company then outstanding?

A. Yes, sir.

No objection to last offer of defendant.

Mr. SEVERANCE: Def't's Ex. 24 read as follows:

"NEW YORK, *January* 26, 1872.

MY DEAR MR. RICE: Judge Barbour has informed me of the proposal of Mr. Marshall and I have said to him to accept, and
127 that he take ⅔ of the proceeds and yourself ⅓, which I believe he has explained to you heretofore.

"As to the ownership of the stock and rights of the M. & N. W., I suppose that they were nearly all in myself, in fact all except such as has been vested in yourself and Judge Barbour.

"I have therefore handed the Judge a transfer in blank of 7,500 shares, covering the original subscription in my name.

"I have at various times set aside shares to enable various gentlemen to act as directors to keep the board full and the Company in life, all of which has been reinvested in me when they came to act as directors, and so far as I know the assignment or transfer of the interests of yourself, Judge Barbour and myself covers and embraces the entire interest.

"Upon the opposite page I have made the assignment referred to, and so far as I am concerned conveys the entire interest I have to Judge Barbour to be disposed of as he may see fit.

"With kind regards for Mrs. Rice and your family, I am as ever,

Your friend and Obedient servant,

ROBERT W. LOWBER."

On the opposite page is the blank assignment he refers to.

Mr. BRIGGS: Ex. 25 is an assignment from John M. Barbour to William R. Marshall of 1,250 shares of the stock of the Minnesota & Northwestern Railroad Company.

Ex. 26 is an assignment from George W. Billings to Wil-
128 liam R. Marshall of 1,250 shares of the capital stock of the Minnesota Northwestern Railroad Company.

Ex. 27 is an assignment from Edmund Rice to Governor William R. Marshall of 3,500 shares of the capital stock.

Ex. 28 is an assignment from William R. Marshall to John S. Kennedy of 5,000 shares of the capital stock of the Minnesota & Northwestern Railroad Company, dated November 22, 1872.

Ex. 29 is an assignment from John S. Kennedy to William R. Marshall of 5,000 shares of the capital stock of the Minnesota & Northwestern Railroad Company, dated March 21, 1883.

Ex. 30 is an assignment from James H. Donaldson to William R. Marshall of 1,666⅔ shares of the stock of the Minnesota & Northwestern Railroad Company, with some additional warrants and agreements.

Ex. 31 is an assignment from William R. Marshall to Benjamin S. Cook, of 2,500 shares of the capital stock of the Minnesota & Northwestern Railroad Company, dated March 27, 1883.

Ex. 32 is an assignment from William R. Marshall to B. S. Cook, of 1,666⅔ shares of the capital stock of the Minnesota & Northwestern Railroad Company, dated November 22, 1872.

Ex. 33 is an assignment from B. S. Cook to A. B. Stickney, of 4,166⅔ shares of the capital stock of the Minnesota & Northwestern Railroad Company, dated March 25, 1883.

Ex. 34 is an assignment from William R. Marshall to
129 A. B. Stickney, of 5,833⅓ shares of the capital stock of the Minnesota & Northwestern Railroad Company, dated December 26, 1883.

Ex. 35 is an assignment from A. B. Stickney to John I. Thompson, Layfayette Shaw, Charles F. Hatch, N. P. Langford and W. A. Spencer, to each one share of the Minnesota & Northwestern Railroad Company, dated December 27, 1883.

Ex. 36 is an assignment from A. B. Stickney to C. W. Benson, D. K. Dunlop, S. H. Graves, D. M. Sabin and C. F. Benson, of one share each of the stock of the Minnesota & Northwestern Railroad Company, dated December 27, 1883.

Q. Mr. Wight, prior to the time of this book here (minute book)—I think you stated down in the office the other day—that the records apparently were kept by loose sheets.

A. I found loose sheets amongst some of the papers, yes, sir; made in 1858 I think it was.

Q. What is this book?

A. This is a record book of all the meetings of the directors and stockholders of the Minnesota & Northwestern Company from December, 1883.

Mr. STONE: December 27, 1883.

WITNESS: Yes, sir.

Q. These are all the meetings recorded of the stockholders since the time these various assignments became vested in Mr. Stickney and his associates?

A. Yes, sir.

Mr. BRIGGS: We offer in evidence pages 1 to 3 and all of
130 4 except the last five lines, that relates to construction contract and has no relation to this matter at all.

No objection.

Mr. Briggs: Also offer pages 13, 14, 15 and that part of page 16 which precedes the minutes of the meeting of March 25, 1884, which begin on that page. John I. Thompson was Secretary of the Minnesota & Northwestern Railroad Company at the time these meetings were held and these minutes are written and signed by him.

Witness: He was elected Secretary at that first meeting, I think.

By Mr. Briggs:

Q. He was Secretary, was he not?

A. Yes, he was the Secretary of the company.

Q. And he signed these minutes which appear in this record?

A. Yes.

Mr. Briggs: Mr. Stone, if there is no objection we will offer all of that part of this record book which we have a copy of here and offer this copy in lieu of it and correct it afterwards if there are any mistakes.

Mr. Stone: No objection.

Copy of minutes marked Def't's Ex. 38.

Mr. Stone: Then the record should show when it is compared. Ex. 38 is to take the place of Ex. 37.

By Mr. Severance:

Q. Mr. Wight, what year was the Minnesota & Northwestern line from St. Paul to the state line built?

A. The building was started in 1884.

131 Q. When was it finished? that is, say when it was opened for traffic.

A. The first time-card issued July 24, 1885.

Q. Now where did that line extend?

A. From St. Paul to the state line at Lyle, Minnesota.

Q. Now since that time has the Minnesota & Northwestern, the Chicago, St. Paul & Kansas City and the Chicago Great Western lines during the times that they have respectively owned this line from Iowa to the state line expended any additional sums of money upon that property?

A. Yes, sir.

Q. For what purpose and when, and have they done it every year?

A. Every year additional side tracks, extending passage tracks, new buildings, additional terminals in St. Paul and Minneapolis, additional real estate all along the line, reducing the grades, straightening tracks, additional equipment, stock yards, station improvements of all kinds.

Q. Year by year since 1885?

A. Yes, sir.

Q. Will you state whether the aggregate amount of such expenditures so made since that time runs up into the millions?

A. From that time to this time?

Q. Yes.

A. Yes, sir, $20,000,000, for the whole line.

Q. I am speaking about the line in Minnesota.

A. I don't know how much was expended in Minnesota.

132 Q. That is, you don't know definitely the amount?

A. No, sir.

Q. You do know, however, that in the aggregate the amount expended in Minnesota runs up into several million dollars?

A. Oh, yes, without any doubt whatever.

Q. During that period?

A. Yes, sir.

Q. When was the bridge over the river built here?

A. In the winter of 1884 and 1885.

Cross-examination.

By Mr. STONE:

Q. You stated that you had been Mr. Stickney's private secretary since 1882?

A. I started with Mr. Stickney as his private secretary in 1882 and been associated with him ever since.

Q. Please state, if you can, when Mr. Stickney first became connected with the Minnesota & Northwestern Railroad project.

A. In the fall of 1883; I don't remember what month—latter part.

Q. Fall of 1883.

A. Yes, sir.

Q. I will ask you if it was not through the initiative of Mr. Stickney that the corporation was revived and its road finally constructed and put into operation.

133 Objected to in the form in which it is asked, because there is no evidence the corporation was revived or ever needed reviving; it is not founded upon any evidence in the case. The corporation has never lapsed.

The COURT: I think he may answer the question.

A. I think that Mr. Stickney was the first one that was ever able to raise any money to build it with.

Mr. SEVERANCE: What was that answer?

WITNESS: I think Mr. Stickney was probably the first one ever able to raise any money to construct the road.

Q. And he it was who did in 1883, 1884 and 1885, raise money to push through the construction and completion of the road in shape for operation; that is true, is it not?

A. Yes, sir.

Q. At the time Mr. Stickney took hold of it there was no money in the treasury, was there?

A. I don't know of any.

Q. You don't know of any?

A. No, sir.

Q. If there had been any you would probably know, would you not?

A. There was no money turned over by any of the old officers of the company—none.

Q. It had no board of directors at that time, had it?

A. I don't know; evidently not; I don't know.

134 Q. Your attention is called to page 1 of Def't's Ex. 37, which I understand is in your handwriting?

A. Yes, sir.

Q. What is that?

A. It is a consent by all the stockholders of the company for a meeting of the stockholders to be held on the 27th day of December, 1883, signed by all the stockholders which the company had.

Q. And it appears that the purpose of that meeting was the election of a board of directors, was it not?

A. Yes, sir; it so states.

Q. And at that meeting a complete board of directors was elected?

A. It so states.

Q. There is no record that at that time there were any directors acting as such?

A. I haven't any record of it.

Q. And you don't know of any such record, do you?

A. No, sir.

Q. You have never seen any such record?

A. Not at that time, no, sir.

Q. And from your experience and knowledge you know, do you not, that if there had been any directors acting at the time the records would probably so show?

Objected as asking for the mere conclusion and opinion of the witness.

Objection sustained.

Q. The minutes of the meeting of the stockholders held on December 27, 1883, as well as the minutes of the first meeting

135 of the board of directors held on the same day are in your handwriting?

A. Yes, sir; I think partially; I don't know that they all are. Part of them are.

Q. The rest of the minutes are in the handwriting of M-. John I. Thompson?

A. Secretary, yes, sir.

Q. Do you know of any records either of stockholders' meetings or of directors' meetings other than those contained in this book?

A. There is a memorandum of some meetings held in New York between 1854, 1855-1858.

Q. Then you have no records either of directors' meetings or stockholders' meetings held between 1858 and 1883? You have never seen any such records?

A. No sir.

Q. During all the years in question, I wish you would state, if you know, whether the gross earnings taxes of the defendant were paid on January 1st of each year or on March 1st of each year.

A. I do not know.

Mr. SEVERANCE: The charter says January.

Mr. STONE: Will you stipulate that to be the fact?

Mr. SEVERANCE: I have no doubt that is true; I think they paid the same as every one else paid.

Mr. STONE: Yes, that is the fact.

Mr. SEVERANCE: If they didn't pay it it was certified.

Q. It was certified each year?

A. The Railroad & Warehouse commission certified the
136 taxes. It would be impossible to pay them on the 1st of January; it seems to me they wouldn't know what they have on January 1st for the preceding year.

Q. Do you know, as a matter of fact, that during all the years since the company first began paying gross earnings taxes the authorities of the state have certified the taxes of the State Auditor for payment on March 1st and that the company has made the payment as of that date?

A. I don't know what date it was paid, don't know anything about it. I hadn't anything to do with it. I know it would be impossible to pay them on January 1st.

Mr. SEVERANCE: I think there is no objection to stipulating that is the fact, undoubtedly. And then in connection with that I would ask you to stipulate, Mr. Stone, that the state made no demand for the payment at any earlier date.

Mr. STONE: It is so stipulated.

Q. Prior to 1884 and 1885, during which years the line from St. Paul to the southern boundary of the state was completed and put in operation as you have stated, the Minnesota & Northwestern Company had no track anywhere, had no equipment of any kind, had it?

A. I think not.

Testimony closed.

The case was then argued by respective counsel and submitted to the Court.

137 DEFENDANTS' EXHIBIT 1.

This Indenture, made this first day of July, in the year of our Lord, one thousand eight hundred and eighty-six, between the Chicago, St. Paul and Kansas City Railway Company, a corporation incorporated, organized and existing under and by virtue of the general statutes of the State of Iowa, party of the first part, and The Metropolitan Trust Company of the City of New York, a corporation duly incorporated, organized and existing under the laws of the State of New York, and Robert H. Benson, of London, England, parties of the second part.

Witnesseth: Whereas, The Chicago, St. Paul and Kansas City Railway Company, hereinafter referred to as "The Railway Company," is duly incorporated, organized and existing under the laws of the State of Iowa, and under and by virtue of its articles of incorporation and the laws of the State of Iowa has full power and authority to construct, lease, purchase and operate railway and telegraph lines in the States of Iowa, Illinois, Minnesota, Wisconsin,

Missouri, Kansas and Nebraska, and to construct, lease, purchase and operate a line of railway and telegraph from the northeast portion of the State of Iowa, southwesterly to the Missouri River in the State of Missouri or Nebraska and such branches thereto as may be hereafter determined upon by the Board of Directors, and

Whereas, The said Chicago, St. Paul and Kansas City Railway Company is in and by the general laws of the State of Iowa
138 authorized to borrow money for the purpose of enabling it to acquire by purchase or consolidation or otherwise, and to construct, complete, improve, equip and operate such railways as it may purchase, construct or otherwise acquire, and to secure money borrowed by it, and for the purpose of raising funds from time to time, the said Railway Company is, by virtue of the said general laws of the State of Iowa, duly authorized and empowered to issue its corporate bonds in sums not less than fifty dollars each, payable to bearer or otherwise, and bearing interest at a rate not exceeding ten per centum per annum, and to sell the said bonds at such rates or prices as the said Railway Company shall deem proper, in such form and bearing such rates of interest, payable at such times and places as the Railway Company, by its Board of Directors, may direct, which bonds they may make convertible into stock, or not as may be deemed expedient, and if such bonds shall be sold below their nominal or par value they shall be valid and binding on the Company and no plea of usury shall be allowed such Corporation in any action or proceeding brought to enforce the collection of said bonds, and

Whereas, By and under the said general laws of the State of Iowa the said Railway Company is duly authorized and empowered to secure the payment of bonds which it is as aforesaid authorized to issue, by the execution and delivery of a mortgage or deed of trust of and upon the railway and railways so acquired or to be ac-
139 quired by purchase or otherwise, or constructed or to be constructed by it as aforesaid, and all other property owned or to be owned, or acquired in any manner by the Railway Company within or without the said State of Iowa, and

Whereas, By said statutes it is further provided that said mortgages or deeds of trust may, by their terms include and cover not only the property of the corporation making them at the time of their date, but property both real and personal which may thereafter be acquired by them and shall be as valid and effectual for that purpose as if the property were in possession at the time of the execution thereof, and

Whereas, By said general statutes of the State of Iowa any railway corporation organized for the purpose of constructing a railway from a point within the State of Iowa may construct or extend the same into or through any other State under such regulations as may be prescribed by the laws of such State, and the rights and privileges of such corporation over such extension in the construction and use thereof, and in controlling and applying the assets shall be the same as if its railway was constructed wholly within said State, and

Whereas, The Railway Company proposes to construct certain

lines of railway in the State of Iowa, and in other States, and proposes to acquire in the future by agreement, consolidation, lease or purchase, or in such other manner as it may be authorized by law, and to control and operate lines of railway which shall or
140 may be continuous with the line or lines of the Railway Company, or connect with them or either of them in the States through which they, or either of them, may be built, and proposes to acquire by purchase or otherwise such other railways as it may be authorized to acquire and as shall in the judgment of the Board of Directors or of the Executive Committee from time to time be deemed essential feeders or connections to said Railway Company's railways, or any part thereof, and

Whereas, The said Railway Company has, deeming the same necessary and expedient, duly resolved to exercise the borrowing power conferred upon it by the general statutes of the State of Iowa for the purpose of borrowing money to be expended in the construction and equipment of its said railways and branches, and the bridges, appendages and appurtenances thereto, and in purchasing the franchises and property of other railway corporations within or without the said State of Iowa which the said Railway Company may now or hereafter have lawful right or power to purchase, lease, construct or consolidate with; also to purchase the bonds or other securities of any railroad or railroads within or without the said State of Iowa which the said Railway Company may now or hereafter have lawful right or power to purchase, own, lease, aid, or consolidate with, and for the purpose of paying up, canceling and extinguishing the bonded indebtedness which may at any time be outstand-
141 ing against any railway, franchises, appurtenances or property which the said Railway Company has or may hereafter purchase, lease, aid or consolidate with, for that purpose has, by resolution of its Board of Directors, duly authorized its President and Secretary to execute in its corporate name and issue from time to time, as its Board of Directors by resolution may direct, its bonds, to be designated as "First Mortgage, Five Per Cent Gold Bonds," at the rate of twenty thousand dollars per mile of railroad actually completed and in operation, including any road which has or may be hereafter purchased, leased, aided or consolidated with by the Railway Company, and an additional amount not exceeding five thousand dollars per mile for the purpose of paying for right of way, depot grounds and terminal facilities in cities having over eight thousand inhabitants, and for the purpose of rolling stock and equipment, which said last named bonds of five thousand dollars per mile shall not be issued for an amount exceeding the actual cash cost of such right of way, depot grounds and terminal facilities, rolling stock and equipment, and an additional amount, not exceeding eight thousand dollars per mile, for the purpose of building a double track upon said road or any portion thereof to be limited to eight thousand dollars per mile of double track (not including side tracks) actually constructed and in operation, which last named bonds to be issued for double track purposes shall not be issued in an amount to exceed the actual cash cost of the double track so actually con-

structed and put in operation, and the whole amount of
142 bonds to be issued under this mortgage shall not exceed sixteen million dollars, and for the purpose of securing payment of the same has fully authorized its President and Secretary to execute in its corporate name and deliver to The Metropolitan Trust Company of the City of New York, and Robert H. Benson, of London, England, parties of the second part, hereinafter referred to as "the Trustees," mortgage or deed of trust bearing date the first day of July, one thousand eight hundred and eighty-six, conveying by way of mortgage or deed or trust all the railways to be constructed by the Railway Company in the State of Iowa, and elsewhere, and also all the railroads owned by the said Railroad Company or which may be acquired or created within or without the State of Iowa by purchase, construction, consolidation or otherwise, and generally the property of the Railway Company within and without the said State of Iowa, acquired or to be acquired, real, personal or mixed, in possession or in expectancy, including the corporate and other franchises of said Railway Company, and

Whereas, Each of the said bonds or obligations is to be in the words and figures following, subject only to the necessary variations as to the numbers thereof, each of said bonds being for the sum of one thousand dollars, to-wit:

143 UNITED STATES OF AMERICA:

No. —. $1,000.

Chicago, St. Paul and Kansas City Railway Company.

First Mortgage, Five Per Cent Gold Bond.

Know All Men By These Presents, That the Chicago, St. Paul and Kansas City Railway Company is indebted to The Metropolitan Trust Company of the City of New York, and Robert H. Benson, of London, England, or bearer, in the sum of one thousand dollars lawful money of the United States of America, which indebtedness it promises to pay in United States gold coin of the present standard, or at the option of the holder in sterling money at the fixed rate of four shillings one and one-half pence per dollar, to the said Metropolitan Trust Company of the City of New York, and Robert H. Benson, or to the bearer hereof, on the first day of July, A. D. one thousand nine hundred and thirty-six, at the office or agency of said railway Company in the city of New York, with interest thereon in the meantime in like gold coin or sterling at the rate of five per centum per annum, payable semi-annually on the first day of January and July of each year, at the said office or agency, upon presentation and surrender of the annexed coupons as they severally fall due, and in case of default in the payment of any half-yearly installment of interest which shall have become payable and shall have been demanded by presentation at such office or agency in the
144 city of New York, of the coupons therefor, and the continuance of such default for the period of six months after the

maturity of such installment, the principal of this bond shall become due in the manner and with the effect, and subject to the conditions provided in the mortgage or deed of trust securing payment of the same hereinafter mentioned.

This is one of a series of bonds, all of like amount, tenor and effect, numbered consecutively, from one upwards, issued and to be issued for the purpose of constructing and equipping its said railroad, and construction of bridges, and purchasing, leasing, aiding in constructing or consolidating with any other railroad or railroads, branch or otherwise and the franchises and properties thereof within or without the State of Iowa, which the said Chicago, St. Paul and Kansas City Railway Company may now or hereafter have lawful right or power to purchase, own, lease or aid in construction, or consolidate with, and for the purpose of purchasing, paying and extinguishing the bonded debt of any railway, now owned by the said Chicago, St. Paul and Kansas City Railway Company, or which may hereafter be purchased or acquired by said Railway Company.

The payment of each and all of the bonds of said series, together with the interest thereon, without reference to the time when said bonds shall be actually issued, is secured by a mortgage or deed of trust bearing date on the first day of July, A. D. one thousand eight hundred and eighty-six, duly executed by the Chicago, St.
145 Paul and Kansas City Railway Company to the said Metropolitan Trust Company, of the City of New York, and Robert H. Benson, of London, England, Trustees, conveying the railroad of the said Railway Company, constructed and to be constructed in the State of Iowa and elsewhere, and all railroads owned by the said Railway Company, or which may be by it acquired or created, within or without the State of Iowa, by purchase, lease, aiding in construction, constructing, consolidation or otherwise, and generally the equipments, appurtenances, property, revenues and franchises, in said mortgage or deed of trust mentioned, as specifically mentioned and set forth in said mortgage or deed of trust. The amount of said bonds authorized by said mortgage is thereby limited as follows:

First. Twenty thousand dollars per mile for every mile of single track railroad actually constructed and in operation.

Second. An additional amount not exceeding five thousand dollars per mile for providing for actual cost proven to the Trustees of rolling stock and equipment and of right of way, depot grounds and terminal facilities in cities of over eight thousand population.

Third. An additional amount not exceeding eight thousand dollars per mile for each mile of double track actually constructed and in operation (exclusive of side track) and not exceeding actual cost thereof, to be certified to the Trustees.

146 Fourth. Not over sixteen million dollars of bonds in all shall be issued under said mortgage.

This bond shall pass by delivery or by transfer on the books of the Company in the city of New York or London. After registration no transfer except upon the books of the Company shall be valid unless the last transfer shall have been to bearer, and transferability by delivery thereby restored, but this bond shall be subject to suc-

cessive registrations and transfer to bearer, or otherwise, as aforesaid, at the option of each holder. This bond shall not become obligatory until it shall have become authenticated by a certificate indorsed hereon, duly signed by the Trustees, to the effect that the same is properly issued.

It is Further Provided, That the Railway Company may at its option, at any time after ten years from date hereof, pay and extinguish the whole issue of bonds secured by said mortgage by giving such notice thereof as is required in said trust deed and paying all the accrued interest on such bonds, if any, together with the face value thereof, with five per centum premium thereon.

In Witness Whereof, The Chicago, St. Paul and Kansas City Railway Company has caused its corporate seal to be affixed, and the same to be attested by the signatures of its President and Secretary, and has caused the coupons hereto annexed to be authenticated by the engraved signature of W. M. Johnston, its Treasurer, at the date of said mortgage on the first day of July, A. D. 147 one thousand eight hundred and eighty-six.

CHICAGO, ST. PAUL AND KANSAS CITY RAILWAY COMPANY.

By ——— ———, *President.*

——— ———, *Secretary.*

Trustees' Certificate.

This is one of a series of bonds, numbered consecutively from one upwards, issued by the Chicago, St. Paul & Kansas City Railway Company, secured by a mortgage of its line of road and other property in said mortgage mentioned, acquired and to be acquired, which has been duly executed, and this bond has been issued in accordance with the provisions of said mortgage.

METROPOLITAN TRUST COMPANY OF THE CITY OF NEW YORK, *Trustees.*

By ——— ———, *President.*

———.

Form of Coupon.

$25.00.

The Chicago, St. Paul & Kansas City Railway Company will pay to the bearer twenty-five dollars, at the office or agency of the Company in the city of New York, in gold coin of the United States of the present standard, or at the option of the holder in sterling money at the fixed rate of four shillings one and one-half 148 pence per dollar, on the — day of ——— A. D. being six months' interest on its first mortgage gold bond No. —.

———, *Treasurer.*

It Is Expressly and Mutually Agreed, That at the option of the said Railway Company the said bonds shall be payable on the first day of July or January of any year after the expiration of ten years from this date by the said Railway Company paying the accrued

interest, if any, on such bonds, together with the face value of all the bonds issued as aforesaid, and hereby secured, together with five per centum premium upon such face value; provided, however, that if said Railway Company shall desire so to pay such bonds after the expiration of ten years and before the maturity thereof, it shall, at least three months prior to the day of such payment, give notice to the bond holders of its election and intention to pay the same as aforesaid by publishing such notice for four consecutive weeks in three daily papers of general circulation printed and published in the city of New York, and in three daily papers of general circulation printed and published in London, England, and thereafter said bonds shall cease to bear interest unless upon presentation of any or all of said bonds for payment the Company shall fail to pay the same in accordance with said notice.

All bonds to be issued hereunder shall be issued only by
149 the sanction of the Trustees, or Trustee for the time being of these presents, and under the following conditions, to-wit: The Trustees shall, after the execution, delivery and recording of this mortgage or deed of trust, on demand of the President, duly authorized by resolution of the Board of Directors of the Railway Company, sanction an issue of bonds to an amount not exceeding twenty thousand dollars per mile of single track railroad actually constructed and in operation, and whenever any additional miles of single track railway within or without the State of Iowa shall be acquired or created by the Railway Company, by purchase, construction, consolidation or otherwise, and such fact shall be made to appear to said Trustees by the affidavits of the President or a Vice President and Chief Engineer of the Railway Company, showing, among other things, the exact length of the railway or railways so acquired or created, said Trustees shall, upon the request of the President, duly authorized by resolution of the Board of Directors of the Railway Company, sanction a further issue of bonds hereunder to an amount, at the rate of, but in no event exceeding, the amount of twenty thousand dollars per mile of single track railway so acquired or created. To provide for the rolling stock and equipment, the necessary right of way, depot grounds and terminal facilities in cities with a population exceeding eight thousand, for the said railway, the Trustees shall, upon the request of the President, duly authorized by resolution of the Board of Directors of the Railway Company, and a certificate of the President or Vice President
150 that said rolling stock and equipment, or right of way, depot grounds or terminal facilities have been purchased and paid for, and are in actual use by the Railway Company, giving detailed statement of said expenditures, and the actual cost of the same, sanction a further issue of bonds hereunder to an amount equal to the cost of the same, but in no event exceeding the sum of five thousand dollars per mile of railway so owned, acquired or created as aforesaid.

The Trustees are also hereby authorized to sanction a further issue of bonds hereunder to an amount not exceeding eight thousand dollars per mile for each mile of double track (exclusive of side track) actually constructed or required and in use by said Company, and not

exceeding the actual cost of the additional track for the purpose of paying the cost thereof; provided, that the Trustees shall not sanction the issue of any bonds for the purpose of paying for the double track until the certificate of the President or Vice President of the Railway Company showing the completion of such track, and the actual cost thereof, is filed with said Trustees. It is expressly understood that the Trustees shall not deliver any bonds to the Company under the provisions of this mortgage on account of any road purchased or otherwise acquired, being incumbered by a previous mortgage or deed of trust, until such incumbrance is removed as hereinafter stated. In case the Railway Company has or may here-
151 after purchase any railway or railways being so incumbered, the Trustees may, and it shall be their duty upon the request of the President duly authorized by resolution of the Board of Directors of the Railway Company, to certify the bonds which the Railway Company would be entitled to issue in respect to such road were the same unincumbered and exchange the same or such portion thereof as said Board of Directors may direct, with such person or persons, corporation or corporations, as said Board may direct, upon receiving all the bonds then outstanding, which are an incumbrance upon such purchased or acquired railway, and it shall be the duty of the Trustees to cause all the bonds so received to be cancelled and a proper satisfaction of the incumbrances on such purchased or acquired road to be entered of record, and deliver the balance (if any) of such bonds so certified on account of road so purchased or acquired to the Company. But it is further expressly provided that the Railway Company having purchased or leased for a period not less than ninety-nine years any railway thus incumbered, or having purchased or acquired an interest in the stock of any such other railway company, may make an agreement to exchange the whole or any portion of the bonds it would be entitled to issue hereunder in respect to such railway were it owned by the Railway Company and unincumbered, and exchange the same for the bonds then outstanding, which are an incumbrance upon such property, giving bonds of the Railway Company at par for bonds of the incumbered Company at
152 such per cent of the par value thereof as may be agreed upon, provided that the bonds issued by the Railway Company when the exchange is fully completed shall be sufficient under such agreement to cancel all of the outstanding incumbrances on the road so purchased, leased or otherwise acquired; and thereupon it shall be the duty of said Trustees, upon filing said contract with them, and upon request of the President, duly authorized by resolution of the Board of Directors of the Railway Company, to certify an amount of bonds issued hereunder equal in the aggregate to the amount of bonds which the Company would be entitled to have certified in respect to such road were it purchased by the Company and unincumbered. It shall be the duty of the Trustees to exchange such bonds from time to time with the holders of the securities of the acquired railroad or any portion of them, in accordance with the terms of said contract, and the securities thus received by the Trustees shall be held by them uncancelled, in trust for the Railway

Company and holders of bonds issued under this mortgage, and as collateral security for all the bonds issued or to be issued under this mortgage or trust deed, collecting the interest and dividends thereupon, as the same shall become due, and paying the same over to the Railway Company, until default in this mortgage, and upon default said income shall be held by the Trustees for the benefit of the bondholders under this mortgage. When all the said securities shall have been exchanged, if said railroad shall have become the
153 property of the Company so that this mortgage may become a first lien thereon, then the Trustees, at the request of the Board of Directors of the Railway Company, shall cause such securities to be cancelled and the mortgage or mortgages securing the same to be satisfied of record, and the surplus of said bonds (if any) certified by said Trustees on account of such railroad shall then be delivered to the Company. It is the intention hereof, and the same is hereby declared, that all of the bonds so to be issued as hereinbefore provided, shall be equally in all respects secured by these presents upon all the property hereinafter described, without preference priority or discrimination on account of or with reference to the times of the actual issue of said bonds or any of them.

Now Therefore, In consideration of the premises, and in consideration of the sum of one dollar, to it duly paid by the said Trustees, the parties of the second part aforesaid, the receipt whereof is hereby acknowledged, and in the execution of the statutory powers in this behalf conferred by the legislature of the State of Iowa:

This Indenture Witnesseth, That the Chicago, St. Paul & Kansas City Railway Company hath granted, bargained, sold and assigned, and by these presents doth hereby grant, bargain, sell, assign, convey and transfer unto the said Metropolitan Trust Company, of the City of New York, and Robert H. Benson, of London, England, and their successors in this trust all and singular, the railroad of the Railway Company or which the Railway Company is author-
154 ized by law to construct, as the same shall hereafter be constructed; and also any and all railways or railway property which the Railway Company may own or hereafter acquire or create in the State of Iowa, and in all other States or Territories, or in either or any of said States or Territories, by purchase, construction, consolidation, or otherwise; and all interests which the Railway Company shall have or acquire in and to any railways, or railway property in all or any of said States or Territories, by its purchase and ownership of the stock or other securities of any railway company; including also all its leasehold interests now existing or hereafter to arise in and to any railway or railway property in any of said States or Territories; including, also, all the railway, right of way, depot grounds, and all lands used in connection with the operation and maintenance of the said railway, now owned by the Railway Company, or hereafter in anywise to be acquired, and all tracks, bridges, viaducts, culverts, fences, and other structures, all depots, station houses, car houses, freight houses, wood houses and other buildings, and all machine shops and other shops now held or acquired, or hereafter to be held or acquired by said Company, its

successors or assigns, in any of said States or Territories, for use in connection with the said railway, or any part thereof, or of any such railways as it may hereafter acquire in any of said States or Territories as aforesaid; and including also, all locomotives, tenders, cars and other rolling stock or equipments, and all machinery,
155 tools, implements, fuel, supplies and material for constructing, maintaining, operating, repairing and replacing the said railway, acquired or to be acquired, or any part thereof, or any of the equipments or appurtenances thereof, or of any part thereof; and including, also, all revenues, rates, tolls, sums of money and income arising or to arise from said railway or other the premises hereinbefore expressed to be conveyed, or any of them; and also all corporate and other franchises, rights, privileges and immunities now owned, held and enjoyed by the Railway Company, or hereafter to be owned, held and enjoyed by, or conferred upon, the said Railway Company, in any of said States or Territories, connected with or relating to the said railway, or railways, acquired, to be acquired, constructed or to be constructed in any of said States or Territories, or to the construction, maintenance or use of the same, and necessary to the full, complete and convenient use, operation and enjoyment of the said above described premises and property, and including, also, all telegraph lines, poles and instruments, telegraph offices and materials, and all the appurtenances, privileges, franchises and immunities therewith connected; it being the intention hereof to include herein, generally, all the property of the Railway Company, real, personal and mixed, in possession and in expectancy, now owned and hereafter to be in anywise acquired in all or any of said States or Territories, together with all and singular the tenements, hereditaments, rights, members, privileges, easements and ap-
156 purtenances to the said railway and premises hereinbefore expressed to be conveyed, or any of them, belonging or in anywise appertaining, or at any time held or enjoyed therewith, and the reversion and reversions, remainder and remainders, tolls, incomes, revenues, rents, issues and profits thereof; and also all the estate, right, title and interest, property, possession, claim and demand whatsoever, as well at law as in equity, of the Railway Company in and to the same, and any and every part thereof, with the appurtenances; it being intended and it is hereby agreed, that all railways and railway property, which shall or may be hereafter in anywise acquired by the Railway Company in either or any of said States or Territories, or in any other State or Territory, shall be as fully embraced within the provisions hereof, and subject to the lien hereby created for the payment of any and all of said bonds so to be from time to time issued as aforesaid, as if the said railways and other property were now owned by the Railway Company and were specifically described herein and conveyed hereby.

To Have and To Hold, All and singular, the above mentioned and described railway, acquired and to be acquired, rolling stock, franchises and other property, and all other the premises hereinbefore expressed to be conveyed, with the appurtenances, unto and to the use of said Metropolitan Trust Company, of the City of New

York, and Robert H. Benson, of London, England, and their successors in said trust, according to the nature, tenor and quality thereof respectively, and upon and for the trusts, intents and purposes hereinafter expressed of and concerning the same; and for the further carrying into effect the conveyance hereinbefore expressed to be made, the Railway Company does hereby appoint the said Trustees, their successors in said trust, and the survivors of them, the attorneys or attorney of the Railway Company, to ask and receive payment and delivery of all and every the sums of money, goods, chattles and effects hereinbefore expressed to be assigned and transferred, and to give effectual releases and discharges, and for all or for any of the purposes aforesaid, or of this instrument, to appoint an attorney or attorneys, an agent or agents, and from time to time to revoke such appointment, and to use the name of the Railway Company, and generally to act in relation to the premises as it or they shall think fit.

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And it is hereby agreed and declared, that the said Trustees and their successors for the time being in said trust, respectively, shall stand possessed of and interested in all and singular the premises hereinbefore expressed to be conveyed upon and for the trusts, intents and purposes, and subject to the powers and conditions following, that is to say:

Article First. Until the Railway Company, or its successors, shall make default in the payment of some principal money or interest of the said bonds, or some or one of them, according to the tenor thereof, or of the coupons thereto annexed, at the time or in the manner appointed for the payment thereof, or shall make default or breach in the performance or observance of any other condition, obligation or requirement by the said bonds or by the present deed imposed on the Railway Company or its successors in reference to the said bonds, the said Trustees and the survivor of them, and every other Trustee, from time to time, of these presents, shall permit and suffer the Railway Company and its successors, to possess, manage, operate and enjoy the said railway, with its equipments and appurtenances, and other the lands, premises, property and franchises hereinbefore described as conveyed hereby, and to receive, take and use the tolls, incomes, revenues, rents, issues and profits thereof, in the same manner and with the same effect as if this deed had not been made.

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Article Second. If, and whenever the Railway Company, or its successors, shall make any default in payment, as mentioned in the last preceding article, upon any of the said bonds or the coupons belonging thereto, and such default shall continue for the period of six months, or if and whenever the Railway Company or its successors shall make default or breach in the performance or observance of any such other condition, obligation or requirement as mentioned in the last preceding article, and such last mentioned default shall continue for the period of six months, then and in either of such cases it shall be lawful for the said Trustees to enter into and upon and to take and possess all and singular the railway and all the premises hereinbefore expressed to be conveyed, or any of them, or

any part or parts thereof, respectively; and to have, hold
159 and use the same, and to work and operate, by their superintendents, managers, receivers or servants, or other attorneys or agents, the said railway; and to conduct the business thereof, and to make from time to time such repairs and replacements and such useful alterations, additions and improvements thereto as may seem to them to be judicious or convenient; and to collect or receive all tolls, freight, incomes, revenues, rents, issues and profits of the said railway and premises, and of every part or parcel thereof, and after deducting and defraying the expenses of working and operating the said railway and conducting the business thereof, and of all the said repairs, replacements, alterations, additions and improvements, and all payments which may be made for charges or liens of any kind, prior to the lien of these presents, and other expenses and outgoings whatsoever incurred in relation thereto, as well as just compensation for their own services and for the services of such attorneys and counsel, and all other agents and persons as may have been by them employed, the said Trustees shall apply the moneys arising from such collection and receipt as aforesaid, in or toward the payment of interest on the said bonds in the order in which the said interest shall have become due, ratably to the persons holding the coupons evidencing the right to such interest; and after paying all interest coupons which shall have become due, shall apply the residue of the said moneys in or toward the payment of the principal of such of the said bonds as may be at that time outstanding and unpaid,
160 ratably and without discrimination as to persons; and if after satisfaction thereof, a surplus shall remain, they shall pay over such surplus to the Railway Company, its successors or assigns, or as any court of competent jurisdiction shall order. Provided, nevertheless, That if the said Trustees shall think it inexpedient, after such entry as aforesaid, to work and operate said railway and premises in manner aforesaid, it shall be lawful for them to demise and let the said railway and premises (subject, however, to the provisions hereof), to any person or persons, corporation or corporations willing to work and operate the same for such term or period, at such rent or proportion of receipts and profits, and generally upon such terms and conditions as the said Trustees shall, in their discretion, think fit; and the said Trustees shall apply the revenue or income to arise from such demise or letting in the same manner as the net revenue or income to arise in the event of the said railway and premises being worked and operated by the said Trustees is applicable under the provisions immediately hereinbefore contained.

Article Third. In case any such default shall be made as aforesaid, in the payment of the principal or interest of said bonds, and shall continue as aforesaid, it shall likewise be lawful for the said Trustees, either after such entry as aforesaid, or other entry, or without entry, by their attorneys or agents, to sell and dispose of all and singular the premises and property hereby conveyed, or any part thereof, at public auction in the city of New York and State
161 of New York, or in the city of Dubuque and State of Iowa, in the discretion of said Trustees, at such time as they may

appoint, first giving notice of said sale, and of the time, place and terms thereof, by advertisement for the term of four weeks in some daily newspaper published in said city of New York, and also in some daily or weekly newspaper published in the city of London, England, and in some daily or weekly newspaper published in the city of Dubuque in the State of Iowa. The sale of said property shall be for cash, either wholly payable in hand or one-third in hand and the balance in two annual installments, with interest, as the Trustees may deem advisable. The proceeds of sale shall be applied first in payment of the expenses connected with said sale and trust, including the compensation of the Trustees, and all charges incurred by them as such Trustees, and secondly, in payment of the unpaid interest and principal of the said several bonds, ratably and without discrimination as to persons; and if, after paying in full said bonds and coupons, there shall be any money remaining in the hands of said Trustees, they shall pay the same to the Railway Company, its successors or assigns. The said trustees shall have power to adjourn said sale from time to time at their discretion; and if adjourned to another date they may make said sale at the time appointed without further notice by advertisement; and said Trustees shall have power to make and deliver to the purchaser or purchasers at said sale, good and sufficient deeds of conveyance of the property sold. And
162 it is further declared and agreed that the receipt of said Trustees shall be a sufficient discharge to the purchaser or purchasers of the premises which shall be sold as aforesaid, for his or their purchase money; and such purchasers shall not, after the payment of such purchase money, be liable to see to its application upon or to the purposes or trusts of these presents, or to be in any manner answerable for any loss, misapplication or non-application of such purchase money, or any part thereof, or to be obliged to inquire into the necessity or expediency of or for any such sale. Provided however, That no sale shall be made by said Trustees as aforesaid, except upon demand of the holders of not less than one-fifth of the said bonds then outstanding, and even in the event of such demand, no sale shall take place if the holders of the majority of said bonds shall by themselves, or by their attorneys in fact, file with said Trustees a written instrument objecting to such sale.

Article Fourth. In case the Railway Company, or its successors, shall make default in payment of any interest on any of the said bonds according to the tenor thereof, or of the coupons thereto annexed (the payment of interest having been demanded by presentation at the Company's office or agency in the city of New York or London, at the option of the holder, of the coupons therefor), and such default shall continue for the period of six months after such demand, then and thereupon the principal of all of said bonds shall, at the election of said Trustees, to be signified to the
163 Railway Company, or its successors, by the said Trustees in writing, become immediately due and payable; provided, nevertheless, that at any time after such default shall have been so made and have continued as aforesaid, and before the actual payment of the principal, it shall be lawful for a majority in interest of the

holders of the said bonds for the time being to direct the Trustees either forthwith to exercise their said power of declaring the principal of said bonds due and payable, or to waive the exercise of said power (if unexercised), or to withdraw and annul the exercise thereof (if exercised), either absolutely or with the consent of the Railway Company, or its successors, and to direct the said Trustees to dismiss any suit brought against said Company upon any bond secured by this mortgage, and release and discharge any judgment or decree obtained thereon, on such terms as may be directed by the said majority, by the same instrument: provided, nevertheless, that no action taken by the said trustees, or by the bondholders under this Article, shall prejudice or affect the powers or rights of the said Trustees, or of the bondholders, in the event of any subsequent default.

Article Fifth. It is hereby declared and agreed that it shall be the duty of the said Trustees to exercise the power of entry hereby granted, or the power of sale hereby granted, or both, or to proceed by suit or suits, in equity or at law, to enforce the rights of the bondholders in the several cases of default on the part of the Railway Company, or its successors, herein specified, in the man-
164 ner and subject to the qualifications herein expressed, upon the requisition of bondholders as herein prescribed, as follows:

First. If the Railway Company, or its successors, shall make any default in the payment of some principal money or interest of said bonds, or some or one of them, according to the tenor thereof, or of the coupons thereto annexed, then and in such case, upon a requisition in writing, signed by the holder or holders of said bonds, to an aggregate amount of not less than one-fifth thereof, and a proper indemnification by such holder or holders of the said Trustees against the costs and expenses to be by them incurred, it shall be the duty of the Trustees to enforce the rights of the bondholders under these presents by entry, sale, or suit or suits, in equity or at law, as they, being advised by counsel learned in the law, shall deem most expedient for the interest of the holders of said bonds. Provided, nevertheless, that it shall be lawful for a majority in interest of the holders of said bonds for the time being, by an instrument under their hands and seals, to direct the said Trustees to waive such default upon such terms as may be directed by the said majority in said instrument. And it is hereby provided that no action taken by the Trustees, or by the bondholders under this clause, shall prejudice or in any manner affect the powers or rights of the said Trustees or of the bondholders, in the event of any subsequent default. And it is hereby further provided and ex-
pressly agreed that no action shall be commenced or prose-
165 cuted against said Company upon any of the coupons annexed to said bonds, or otherwise, at law or otherwise, except by the Trustees, as in this Article provided.

Second. If the Railway Company, or its successors, shall make default or breach in the performance or observance of any other condition, obligation or requirement by the said bonds or by this present deed imposed on the Railway Company, or its successors, then and in such case the Trustees shall, upon a requisition in manner

aforesaid of not less than one-fifth in interest of the bondholders for the time being, and upon a proper indemnification by such applying bondholders of said Trustees against the costs and expenses to be by them incurred, enforce the rights of the bondholders under these presents in the manner by the first clause of this Article provided, subject to a power in such majority at any time to direct in manner aforesaid the said Trustees to waive such default or breach, upon reparation therefor to the satisfaction of such majority being made. And it is hereby provided that no action taken by the said Trustees, or by the bondholders under this clause, shall prejudice or in any manner affect the powers or rights of the said Trustees, or of the bondholders in the event of any subsequent default or breach.

Article Sixth. The action of the Trustees herein, in regard to enforcing to any extent the lien created by this mortgage, either by taking possession or by sale at auction, or by lease, or by resort to judicial proceedings, or by any means authorized or contem-
166 plated hereby, shall be at all times subject to the control of a majority in amount of the holders of said bonds, their wishes being expressed in writing to said Trustees, but this mortgage shall not be foreclosed, nor shall the property herein mortgaged, nor any of the same, be sold except upon a default in the payment of the principal or interest upon the said bonds, which shall have continued for more than six months, and then only upon the application as above provided of bondholders holding said bonds to the amount of not less than one-fifth of the same then outstanding, which action on the part of said bondholders shall be at all times subject to the control of the majority in amount of the holders of said bonds as herein provided. And it is hereby further expressly agreed that in the event of default by the Railway Company in the payment of principal or interest of said bonds, or otherwise, a majority in interest of the bondholders for the time being shall have the right to agree upon a plan or scheme of reorganization, which plan or scheme when agreed upon in writing, and signified to the Trustees, shall govern their action thereafter, and shall be in all respects binding and obligatory upon all of the holders of said bonds.

Article Seventh. It being, as hereinbefore recited, in part the object and intention of these Presents to provide by means of the bonds to be issued hereunder, for the purchase or retirement by way of exchange or otherwise of the bonds or other securities of any rail-
way or railways within or without said State of Iowa, which
167 the Railway Company has heretofore, or may now or hereafter lawfully purchase, own or consolidate with, it is expressly understood, covenanted and agreed, in order to effectuate such object and purpose and pending the attainment thereof, that all bonds secured by mortgage upon any railway or railways within or without the State of Iowa, which railway or railways are now or shall be hereafter acquired by the Railway Company by purchase, consolidation, or otherwise, outstanding at the date of such acquirement, which shall be retired or replaced by exchange, or otherwise, by the bonds provided to be issued hereunder and secured hereby, shall be delivered to the Trustees, to be by them held uncancelled

until all the bonds of each class or series shall have been retired or replaced as aforesaid, and said bonds so delivered to said Trustees to be held uncancelled as aforesaid, shall be held by said Trustees until cancelled as hereinafter provided, as further security to the holders of the bonds issued hereunder in exchange for the same and as collateral thereto, and also for the benefit and the protection of the Railway Company. And the several mortgages or trust deeds given to secure the payment of the bonds which shall be so delivered to said Trustees, to be by them held uncancelled as aforesaid, shall remain in full force and effect in all respects until the bonds to secure the payment of which each said mortgage or deed of trust was originally executed, shall have been fully cancelled as hereinafter provided, and each such mortgage or deed of trust, and the
168 bonds secured thereby, and delivered to said Trustees, as aforesaid, shall retain its and all of its priorities, rights, benefits, privileges and legal incidents as fully as if this instrument had not been executed, and the said Trustees shall, as the holders of such uncancelled bonds, enforce the said several mortgages or trust deeds executed to secure the payment of the same respectively, whenever and in such manner as shall be necessary and proper in order to protect the parties interested therein, as aforesaid, and the Railway Company, from the holders of similar bonds who shall not have substituted therefor the bonds hereby provided for, if any such holders there shall be, and for that purpose the said Trustees are hereby appointed the agents of the Railway Company, and of all the parties interested, as aforesaid, in said bonds so to be held uncancelled, with full and adequate powers in the premises.

But whenever all of the bonds of any class or series, secured by any of said mortgages or deeds of trust, shall have been delivered to said Trustees, it shall be the duty of the Trustees to cancel or procure the cancellation of the same, unless the Railway Company shall request to have them kept alive for the purpose of perfecting its title to any of the property upon which the same were secured, in which event it is agreed that the same may be used by the Railway Company for the purpose of perfecting, through foreclosure or otherwise, its said title; provided, however, that the lien hereof is in no event to be displaced or in any manner affected by any such proceeding, but any and all title which the Railway Company may acquire
169 through or by means of any proceeding upon any such mortgage or deed of trust shall be subject and subordinate to the lien of these presents, and the Railway Company hereby covenants and agrees that any title it may so acquire shall be by it conveyed at once to the said Trustees by a proper deed of further assurance.

Article Eighth. The said Trustees shall have full power and discretion, upon the written request of the Railway Company, to convey, by way of release or otherwise, to the person or persons, corporation or corporations, designated by the Railway Company, any lands acquired or held for the purposes of stations, depots, shops, or other buildings, and shall also have power to convey as aforesaid, on like request, any lands or property which in the judgment of the Trustees, shall not be necessary for use in connection with the said railway,

or which may have been held for the supply of fuel, gravel, or other material; and also to convey as aforesaid, on like request, any lands not occupied by the track, which may become disused by reason of a change of the location of any station house, depot, shop, or other building connected with the said railway, and such lands occupied by the track or tracks thereof, and adjacent to such station house, depot, shop or other building, as the Railway Company may deem it expedient to disuse or abandon by reason of such change; and to consent to any change, and to such other changes in the location of the track or depots, bridges, or other buildings or structures, as in its
170 judgment shall have become expedient, and to make and deliver the conveyances necessary to carry the same into effect; and the Trustees shall also have full power to allow the Railway Company from time to time to dispose of, according to its discretion, such portions of the equipment, machinery and implements, at any time held or acquired for the use of the Railway Company, as may have become unfit for such use, replacing the same by new, and all the property acquired for replacing any of the property conveyed under the provisions of this Article shall immediately be and become, without any other act or conveyance upon the part of the Railway Company, subject to the operation and lien of these Presents.

Article Ninth. The party of the first part doth hereby covenant promise and agree to and with the parties of the second part, and their successors, that the party of the first part will well and truly pay the said bonds which these presents are executed to secure, and the interest due and to grow due thereon, according to the tenor thereof; and also that the party of the first part will not at any time, or in any manner, take, apply for or avail itself of any injunction or stay of proceedings, or plead, use, interpose or take advantage of any extension law, stay law, valuation law, redemption law, or any other law of the State of Iowa or any other state or territory in which it may own property covered by this mortgage, now in force or which may hereafter be in force in either of the said states or territories,
171 and which may in any way alter, affect, impair or impede the rights or remedies of the holders of said bonds, or of the said parties of the second part, or of their successors as herein declared, or which shall affect or change the time, place, means or mode of perfecting, enjoying or enforcing any of such rights, interests or remedies, as the same are herein declared and set forth.

Article Tenth. Subject to the security hereby created for the due payment of the said bonds, and the principal moneys and interest thereon, and for the performance and observance of the conditions, obligations and requirements thereby, or by the present deed, imposed on the Railway Company and its successors, said Trustees shall stand possessed of all and singular the premises hereinbefore expressed to be conveyed, and the property and effects for the time being representing the same, in trust for the Railway Company, its successors and assigns, and upon and immediately after the due completion of every such payment, and the due performance and observance of every such condition, obligation and requirement, said Trust-

ces shall reconvey all and singular the said premises, property and effects to the Railway Company, its successors and assigns, or as they shall direct.

Article Eleventh. It is mutually agreed by and between the parties hereto, that the expressions "the said Trustees," and "the Trustees," as used in these Presents, shall be construed to mean the Trustee or Trustees for the time being, and it is mutually agreed by
172 and between the parties hereto, that every Trustee of these presents shall be entitled to the ordinary indemnity and right to reimbursement given to Trustees; and shall not be answerable for any error or mistake made by it or him in good faith, but only for gross negligence or wilful default in the discharge of its or his duties as Trustee, and also, that every such Trustee shall be entitled to just compensation for all services which he or it may hereafter render in this trust, to be paid by the Railway Company, or its successors, out of the income of the trust property; and for that purpose he or it may at any time apply to any court of competent jurisdiction, without notice, except to the Railway Company or its successors; and in the event of the death, resignation, declination or inability to act of the said Trustees or any Trustee of these presents, it shall be the duty of the Railway Company to give notice to the bondholders, by advertisement, for four successive weeks, in some daily newspaper published in the city of New York, and in some daily newspaper published in the city of London, England, of a time and place of meeting for the election of a Trustee or Trustees, at which meeting a majority in interest of the bonds there represented may, with the concurrence of the Railway Company in the choice of said majority, elect or appoint a Trustee; and in the event that the Railway Company and said majority cannot agree upon a Trustee, then upon application of any bondholder under these Presents, and notice to the Railway Company, or upon application of the Railway Company, a Trustee may be appointed by a judge of the Circuit Court
173 of the United States for any district of Iowa. Upon the election or appointment of any such Trustee at any meeting as aforesaid, a statement or certificate of such election or appointment shall be made showing the amount of said bonds represented at said meeting, and the amount thereof voting for the Trustee so elected or appointed; which statement or certificate shall be signed by the president or chairman and secretary of said meeting, and by the proper officers of the Railway Company, and said statement or certificate shall have attached thereto a copy of said printed notice, with proof of the publication thereof. If an appointment of Trustee shall be made by a judge of said Circuit Court, as hereinbefore provided, the party applying for such appointment shall procure the appointment to be signed by said judge making the same and attested by the clerk of said court, and shall have attached thereto a copy of the application for such appointment. And the said attachment or certificate of election or appointment at said meeting, and the appointment of the Trustee, signed by such judge as aforesaid, shall be filed with the Secretary of the State of Iowa, and the person or persons or corporation named in such statement or certificate, or in such judge's ap-

pointment, shall thereupon be and become the Trustee for the time being of these Presents, as fully to all intents and purposes as if this present deed had in the first place been executed and delivered to such person or persons or corporation. Provided, that if by death, resignation or otherwise a vacancy shall occur as to either of the Trustees herein designated, the surviving or remaining Trustee shall, until said vacancy shall have been filled as herein provided, execute all the powers under this instrument conferred upon said Trustees herein, as fully to all intents and purposes as though he or it had originally been appointed herein as sole Trustee.

And the said party of the first part, for itself and its successors, in consideration of the premises and of one dollar to it paid by the parties of the second part, the receipt whereof is duly acknowledged, hereby further covenants and agrees to and with the said parties of the second part, and their successors, that the said party of the first part, and its successors, shall and will from time to time, and at all times hereafter, and as often as thereunto requested by the Trustees, execute, acknowledge and deliver all such further deeds of conveyance and assurances in the law for the better assuring unto said Trustees the said railway, equipments, appurtenances and all other property and things whatsoever hereinbefore mentioned as by this instrument to be conveyed, and all franchises of every nature pertaining thereto, now held or hereafter to be acquired by the Railway Company, as by said Trustees, or by their counsel learned in the law, shall be reasonably advised, devised or required; and the said party of the first part, for itself and its successors, in consideration of the premises, and of one dollar to it duly paid by the said party of the second part, the receipt whereof is duly acknowledged, further covenants and agrees to and with the said parties of the second part, and their successors, that it, the said party of the first part, and its successors, shall and will at all times hereafter keep open an office or agency in the cities of New York and London, England, for the payment of the principal and interest of and upon the bonds hereinbefore recited and described, as the same shall become payable, and for the transfer and registration of the said bonds, and that any and every default in the due performance of this covenant shall be deemed and taken to be a waiver of presentment and a demand of payment of all and every of the bonds and coupons aforesaid which may become payable during the continuance of said default.

In witness whereof, the said party of the first part, the Chicago, St. Paul and Kansas City Railway Company, has caused these presents to be signed by its President, sealed with its corporate seal and countersigned by its Secretary, and to testify their acceptance of said trust the said Metropolitan Trust Company, of the City of New York, has likewise caused the same to be signed by its President and Secretary, and sealed with its corporate seal, and the said Robert H. Benson has hereto set his hand and seal.

CHICAGO, ST. PAUL AND KANSAS CITY RAILWAY COMPANY.

By R. F. WILSON, *President.*

M. C. WOODRUFF, *Secretary.*

[CORPORATE SEAL.]

176 Signed, sealed and delivered by R. F. Wilson, President, in presence of
WILLIAM H. CLARKSON.
C. H. BOSHER.

Signed, sealed and delivered by M. C. Woodruff, Secretary, in presence of
ROBERT C. WIGHT.
W. H. KNOWLTON.
METROPOLITAN TRUST COMPANY OF THE CITY OF NEW YORK,
By THO. HILLHOUSE, *President*.
WALTER J. BRITTIN, *Secretary*.
[CORPORATE SEAL.]
R. H. BENSON,
—— ——, *Trustees*. [SEAL.]

Signed, sealed and delivered by Thomas Hillhouse, President, and Walter J. Brittin, Secretary, of the Metropolitan Trust Company of the City of New York in presence of
JOHN C. TELFORD.
CHARLES M. JESUP.

Signed, sealed and delivered by Robert H. Benson in presence of
F. H. NEIGOD, *Chief Clerk*.
H. H. NEWMAN, *Clerk*,
U. S. Consulate General, London.

(Duly acknowledged.)

177 STATE OF IOWA,
Warren County, ss:

Filed for record the 3rd day of May, A. D. 1888, at 11:40 o'clock A. M., and recorded in Book 31 of Mortgages, on page 383 to 419, of Warren County Records.

ADDIE HAYDEN, *Recorder*.

DEFENDANT'S EXHIBIT 2.

Minnesota and Northwestern Railroad Company
to
Metropolitan Trust Company.

Mortgage.

This indenture, made this first day of December, 1887, between the Minnesota and Northwestern Railroad Company, a corporation under the laws of the State of Minnesota, party of the first part, and the Metropolitan Trust Company, of the City of New York, a corporation under the laws of the State of New York, party of the second part.

Witnesseth: Whereas, the said party of the first part is the owner of five hundred and ten miles of completed single track railroad, consisting of a line extending from the City of St. Paul, State of Minnesota, in a southerly and southeasterly direction through the City of Dubuque, Iowa, to the City of Chicago, Illinois, and
178 a branch from Hayfield, Dodge County, Minnesota, upon said line to Manly Junction, in the County of Worth, State of Iowa; also with a branch from Summer, on said line, in Bremer County, Iowa, westerly to Hampton, in Franklin County, Iowa; together with about four miles of double track railroad between West St. Paul and South St. Paul, in Ramsey and Dakota Counties, State of Minnesota. And also owns, in connection with said railroad, extensive and valuable terminal facilities in the Cities of St. Paul, Minneapolis and Dubuque, which terminal facilities are worth a much larger sum than when the same were acquired by the Company; and the Company has provided said railroad with rolling stock and equipment, and is now running and operating the same; and

Whereas, the Company has full authority to borrow money, and for that purpose is duly authorized by the laws of the State of Minnesota to execute and deliver its corporate bonds, secured by mortgage or deed of trust upon all its property now existing or to be hereafter created or acquired; and

Whereas, the Board of Directors of the Railroad Company deeming the same necessary and expedient, has duly resolved to exercise the borrowing power conferred upon the company as aforesaid and by resolution has duly authorized and directed the President and Secretary to execute in its corporate name and deliver bonds of said Company of the par value of two million dollars, to be known as Five Per Cent. Debenture and Equipment Gold Bonds; and
179 has duly authorized its President and Secretary to execute in its corporate name and deliver to the Metropolitan Trust Company, of the City of New York, as trustee, a mortgage, or deed of trust, bearing date of the first day of December, 1887, conveying by way of mortgage all the said railway of the Railroad Company, together with all its other property now existing, for the purpose of securing said bonds; and

Whereas, each of said bonds is to be in words and figures following subject only to the necessary variations as to the numbers thereof, each of the same being for the sum of one thousand dollars, to-wit:

UNITED STATES OF AMERICA.

No. —. $1,000.

Minnesota and Northwestern Railroad Company.

Five Per Cent. Debenture and Equipment Gold Bond.

The Minnesota and Northwestern Railroad Company promises to pay to the bearer hereof on the first day of January, A. D. 1938, the sum of One Thousand Dollars in gold coin of the present stand-

ard, or at the option of the holder in sterling money at the rate of forty-nine and one-half pence per dollar, with interest thereon from the first day of January, 1888, at the rate of five per cent. per annum in like gold coin or sterling, payable semi-annually on the first day of January and July of each year; both principal and interest to be paid in the City of New York at the office or agency of the Railroad Company.

180 This bond is one of a series of bonds issued in pursuance of a resolution of the Board of Directors of the said Company adopted December 1st, 1887, to the amount of two million dollars, and is secured by mortgage bearing date the first day of December, 1887, executed to the Metropolitan Trust Company of the City of New York as trustee, upon the railroad of the said Company, and its other property.

This bond shall pass by delivery or by transfer on the books of the Company in the City of New York. After registration no transfer except upon the books of the Company shall be valid unless the last transfer shall have been to bearer.

This bond shall, for identification, be duly certified by the said trustee.

In witness whereof, the Railroad Company has caused these presents to be executed by its President and Secretary and its corporate seal to be hereto affixed this first day of December, 1887.

MINNESOTA AND NORTHWESTERN RAILROAD COMPANY.

By —— ——, *President.*
—— ——, *Secretary.*

Trustee's Certificate.

This is one of a series of two million dollars of bonds of the Minnesota and Northwestern Railroad Company, issued in accord-
181 ance with the provisions of a mortgage executed by said Company, bearing date December 1st, 1887.

METROPOLITAN TRUST COMPANY OF THE CITY OF NEW YORK.

By —— ——, *President.*
—— ——, *Trustee.*

Form of Coupon.

$25.00.

The Minnesota and Northwestern Railroad Company will pay to the bearer twenty-five dollars at the office or agency of the Company in the City of New York, in gold coin of the present standard, or at the option of the holder in sterling money at the rate of forty-nine and one-half pence per dollar on the — day of —— A. D. —— being six months' interest on its five per cent debenture and equipment gold bond, number —.

—— ——, *Treasurer.*

All bonds to be issued hereunder shall, for identification, be duly certified by the trustee. The trustee shall, after the execution and delivery of this mortgage, on request of the Railroad Company, certify and deliver to the Company the whole series of bonds, amounting, at par, to the sum of two million dollars.

And it is hereby expressly agreed that if before said bonds shall be actually certified, the Railroad Company shall transfer its railroad, or of its property shall become consolidated with the property of any other Railroad Company, the said bonds, shall, not-
182 withstanding said transfer or consolidation, be certified and delivered by the trustee to the successors or assigns of the Railroad Company on request of said successors or assigns.

It is hereby agreed that the Railroad Company or its successors or assigns may purchase or acquire rolling stock and equipment, and in its or their discretion cause the said rolling stock and equipment to be conveyed to the trustee in this mortgage in trust; and upon the same being so conveyed to said trustee, the said trustee shall stand seized and possessed thereof in trust for the holders of bonds hereby secured, and shall hold the said rolling stock and equipment as further security to the holders of said bonds, and the same shall thereupon become, without any other deed, act, or conveyance, subject to the lien of this mortgage, and all its terms, provisions and conditions. In such event it is hereby expressly declared that this mortgage shall become a lien upon said rolling stock and equipment prior to the lien of any other mortgage of the Railroad Company or its successors or assigns.

Now, therefore, in consideration of the premises, and in consideration of the sum of one dollar to the Railroad Company in hand paid, the receipt of which is hereby acknowledged, and in execution of the statutory powers upon it conferred;

This indenture, witnesseth: That the Minnesota and Northwestern Railroad Company hath granted, bargained, sold and assigned, and by these presents doth grant, bargain, sell, assign, convey and transfer unto the Metropolitan Trust Company of the City of
183 New York, and its successors in this trust, subject to the first mortgage of the Railroad Company hereinafter described, all the railroad of the Railroad Company hereinbefore described, together with all leaseholds or other interests of the Railroad Company in the property of other Railroad Companies, including also all the rights of way, depot grounds, and lands used in connection with said railroads, and all tracks, bridges, viaducts, culverts, fences and other structures; all depots, station houses, engine houses, car houses, freight houses, wood houses and other buildings; and all machine shops and other shops; including also all locomotives, tenders, cars, and other rolling stock and equipment, and all machinery, tools, implements, fuel, supplies, and the telegraph lines, instruments and appliances used in connection with said railroad; including also all revenues, tolls, rents and incomes arising or to arise out of said property; and all corporate and other franchises, rights, privileges and immunities of the said Railroad Company,

together with all railroads and other property of every kind whatsoever now owned by the said Railroad Company.

To have and to hold the same unto the use of said Metropolitan Trust Company of the City of New York, and its successors in this trust, upon the trusts, intents and purposes hereinafter expressed. And for the further carrying into effect of this conveyance the Railroad Company hereby appoints the trustee and its successors, the attorney of the Railroad Company, to ask and receive pay-
184 ment and delivery of all and every the sums of money, goods, chattels and effects hereby mortgaged, and to give effectual releases and discharges; and for all the purposes of this instrument the trustee is hereby authorized to appoint an attorney or attorneys, an agent or agents, to revoke from time to time such appointment, and use the name of the Railroad Company, and generally to act in relation to the premises as it shall think fit.

It is hereby agreed and declared, that the trustee and its successors in said trust shall stand possessed of the premises hereby mortgaged upon the following trusts, and subject to the following powers and conditions:

Article First. Until the Railroad Company, its successors or assigns, shall make default in payment of some principal money or interest of said bonds, or shall make default on breach in the performance of some other condition or obligation of this instrument, the trustee and its successors shall permit the Railroad Company and its successors to possess and operate the said railroad and all the mortgaged property, and receive and take the incomes, issues and revenues thereof in the same manner as if this deed had not been made.

Article Second. If the Railroad Company or its successors shall make any default in payment of principal or interest, and said default shall continue for six months, or shall make default or breach in the performance of any other condition or obligation of this mortgage, and said last mentioned default shall continue for six
185 months, then and in either case the trustee is hereby authorized to enter upon and possess the property hereby mortgaged, or any part thereof, and to manage and operate the same by its superintendents, managers or servants, or by its attorney or attorneys, and to make from time to time such repairs, alterations and improvements to said property as may seem to it judicious, and collect and receive all the incomes, revenues, issues and profits of said mortgaged property and every part thereof. And after defraying its expenses in the premises, and all charges or liens of any kind prior to the lien of these presents, and its own just compensation, the trustee shall apply the moneys arising from such collection and receipt toward the payment of interest on the bonds in the order in which said interest shall have become due ratably to the holders of interest coupons; and after paying such past due interest, the surplus, if any, shall be applied by said trustee to the payment of all the bonds then unpaid ratably and without discrimination. If after satisfaction thereof a surplus shall remain, the trustee shall pay such surplus to the Railroad Company, its successors or assigns. Provided,

that if the trustee shall deem it inexpedient after entry as aforesaid, to operate said railway, it is authorized to lease the same or any part thereof to such person or corporation, and for such a period and at such rent or proportion of income and generally upon such terms and conditions as the trustee shall think fit; and in such case the trustee shall apply the income arising from
186 such leasing in the same manner as income arising from operation, and as before stated.

Article Third. In case of any such default in payment of principal or interest of said bonds continuing for a term of six months, the trustee is hereby authorized, after entry or without entry, to dispose of all and singular the property hereby mortgaged, or any part thereof, by public auction in the City of New York or in the City of St. Paul, in the discretion of the trustee at such time as it may appoint, first giving notice of sale as provided by law, and also notice for a term of four weeks in a daily newspaper published in the City of New York, and in a daily or weekly newspaper published in the City of London, England. The trustee may adjourn the sale from time to time in its discretion, and if adjourned, it shall not be obliged to give any further notice by advertisement. And the trustee upon such sale is hereby authorized to convey to the purchaser or purchasers the property sold by good and sufficient deeds of conveyance, and the receipt of the trustee shall be sufficient discharge to the purchaser or purchasers at such sale for his or their purchase money. And the purchaser or purchasers shall not be liable to see to the application of his or their purchase money by the trustee, and shall not be obliged to enter into the necessity or expediency of or for any such sale: Provided, however, that no such sale shall be made by the trustee as aforesaid except upon demand of the holders of at least one-fifth of the outstanding bonds; and even in that
187 event no sale shall take place if the holders of a majority of bonds by themselves or attorneys in fact file with the trustee a written objection to such sale. In case of such sale the proceeds thereof shall be applied in the manner hereinbefore stated, with respect to the application of moneys arising from operation of the road by the trustee.

Article Fourth. In case the Railroad Company, its successors or assigns, shall make default in the payment of interest upon any of said bonds, and said default shall continue for a period of six months, thereupon the principal of all of said bonds shall at the election of the trustee, to be signified to the Railroad Company, its successors or assigns in writing, become immediately due and payable: Provided, that at any time after such default which is continued as aforesaid, and before actual payment of the principal, it shall be lawful for a majority in interest of the holders of said bonds to direct the trustee forthwith to exercise its option and declare the whole principal due, or waive the exercise of said power, or withdraw or annul the exercise thereof if exercised, and to direct the trustee to dismiss any suit brought upon any bonds secured by this mortgage, and release any judgment or decree obtained thereon upon such terms as may be directed by said majority. Provided, further, that no action

taken by the trustee or by the bondholders under this article shall prejudice or affect the powers of the trustee or the bondholders in the event of subsequent default.

188 Article Fifth. It is further agreed that in case of any of the defaults hereinbefore mentioned the trustee shall, upon the request in writing of the holders of at least one-fifth of the outstanding bonds, and upon being indemnified against costs and expenses, take such steps and proceedings to enforce the rights of the bondholders under this mortgage by entry, sale, suits in equity or at law, as the trustee, being advised by counsel, shall deem most expedient for the interest of the holders of such bonds. Provided, that a majority in interest of the holders of said bonds by filing a request in writing, signed by themselves or attorneys in fact, with the trustee, may direct the trustee to waive such default or take such steps as the said majority may direct, and no action taken by the trustee or the bondholders under this clause shall prejudice the rights of the trustee or bondholders in the event of any subsequent default: And no action shall be commenced or prosecuted against said Company upon the coupons annexed to said bond at law or otherwise, except by the trustee, as is provided herein.

Article Sixth. It is the intention hereof that all remedies hereby given to the trustee for the enforcement of this mortgage shall at all times be subject to the control of a majority in interest of the holders of said bonds, and it is further expressly agreed that in the event of default continuing for the period of six months as aforesaid, a majority in interest of the bondholders shall have the right to agree upon a plan or scheme of reorganization, which plan

189 or scheme when agreed to in writing, and signified to the trustee, shall govern its action, and shall be in all respects binding and obligatory upon all the holders of said bonds.

Article Seventh. The trustee is hereby empowered upon the written request of the Railroad Company to convey by way of release or otherwise to the person or corporation designated by the Railroad Company, any lands not occupied by the main track of said Company which the Railroad Company may deem it expedient and advisable to disuse or abandon. And the trustee is further authorized to allow the Railroad Company to dispose of, in its discretion, such portion of its equipment, machinery and implements as the Railroad Company may deem it advisable to dispose of.

Article Eighth. This mortgage is made subject to a certain mortgage executed by said Railroad Company to the Metropolitan Trust Company of the City of New York and Robert H. Benson of London, England, Trustees, bearing date the first day of July, 1884, and securing bonds of said Railroad Company described in said mortgage, and known as First Mortgage Five Per Cent. Gold Bonds.

Article Ninth. Upon due performance of all the agreements of this mortgage, and upon payment of the bonds hereby secured, both principal and interest, all the property covered hereby shall revert to the Railroad Company, its successors or assigns, and it is made the duty of the trustee in such event to reconvey the same to the Rail-

road Company, its successors or assigns, or as it or they may direct.

190 Article Tenth. The word "trustee" or "said trustee" as used herein, shall be construed to mean the trustee or trustees for the time being of this mortgage, and every trustee hereof shall be entitled to the ordinary indemnity and right of compensation given to trustees, and shall not be answerable for any error or mistake made in good faith, but only for gross negligence or wilful misconduct: And every trustee shall be entitled to just compensation for all services rendered in this trust, to be paid by the Railroad Company, its successors or assigns, out of the income of the trust property, and may apply to any court of competent jurisdiction to fix such compensation without notice except to the Railroad Company. In the event of death, resignation, declination or inability to act, of said trustee, or any trustee of this mortgage, it shall be the duty of the Railroad Company to give notice to the bondholders by advertisement for four successive weeks in a daily newspaper published in New York, and one published in London, England, for a time and place of meeting for the election of a trustee, at which meeting a majority of the bonds there represented may, with the concurrence of the Railroad Company, elect a trustee or trustees. In the event of disagreement, a trustee or trustees may be appointed by any judge of the circuit court of the United States for the district of Minnesota, upon application of the Railroad Company, or on the application of any bondholder, notice having first been given to the Railroad Company. If at any time there shall be two or

191 more trustees to this mortgage, the powers hereby given shall vest in the survivor or survivors of said trustee. The Railroad Company hereby further covenants that it will at all times keep open an office or agency in the City of New York for the payment of principal and interest upon such bonds as the same shall become due and payable, and for the transfer and registration of bonds, and a default in this respect shall constitute a waiver of presentation and demand of payment of all and every of the bonds and coupons falling due during the continuance of said default.

In witness whereof, the Minnesota and Northwestern Railroad Company has caused these presents to be signed by its President and Secretary and sealed with its corporate seal. And to testify its acceptance of said trust, the Metropolitan Trust Company of the city of New York has caused the same to be signed by its President and Secretary, and sealed with its corporate seal.

MINNESOTA AND NORTHWESTERN RAILROAD COMPANY.

By —— ——, *President.*

—— ——, *Secretary.*

METROPOLITAN TRUST COMPANY OF THE CITY OF NEW YORK.

By —— ——, *President.*

—— ——, *Secretary.*

(Duly acknowledged.)

192 DEFENDANT'S EXHIBIT 3.

Articles of Incorporation of the Minnesota and Northwestern Railroad Company.

The undersigned Robert D. McFadon, William A. Gardner, Henry A. Gardner, John I. Thompson and Adolphus F. Schiffman, being desirous to become an incorporated company, under and by virtue of an act of the General Assembly of the State of Illinois, entitled "An act to provide for the incorporation of associations that may be organized for the purpose of constructing railways, maintaining and operating the same; for prescribing and defining the duties and limiting the powers of such corporations when so organized." Approved and in force March 1, 1872; and other acts supplementary thereto and amendatory thereof, for the purpose of constructing, maintaining and operating a railway in the State of Illinois, hereby adopt and sign these articles of association or incorporation.

First. The name of the proposed corporation shall be Minnesota and Northwestern Railroad Company.

Second. The places from and to which it is intended to construct the proposed railway are from the City of Chicago, in the County of Cook, to East Dubuque, in Jo Daviess County.

Third. The place at which shall be established and maintained the principal business office of such proposed corporation is the City of Chicago.

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Fourth. The time of commencement of such proposed corporation shall be the fifteenth day of February, A. D. 1886, and the period of continuance shall be the fifty years next ensuing thereafter.

Fifth. The amount of the capitol stock of such corporation shall be Five Million Dollars.

Sixth. The names and places of residence of the several persons forming the association for incorporation are as follows:

Names.	Residence.
Robert D. McFadon	Chicago, Illinois.
William A. Gardner	Chicago, Illinois.
Henry A. Gardner	Chicago, Illinois.
John I. Thompson	St. Paul, Minnesota.
Adolphus F. Schiffman	St. Paul, Minnesota.

Seventh. The names of the members of the first Board of Directors are as follows: Robert D. McFadon, William A. Gardner, Henry A. Gardner, John I. Thompson and Adolphus F. Schiffman.

The government of the proposed corporation and the management of its affairs shall be vested in the Board of Directors and their successors in office. The Board of Directors may elect one of their members as President, and may elect such other subordinate officers as such corporation by its by-laws may designate. All officers elected

or appointed by the Board shall hold their office during the pleasure of the Board, and have such powers and authority as may
194 be delegated to them by the Board of Directors, and as may be prescribed in the by-laws of the corporation.

Eighth. The number of the shares of the capital stock of such proposed corporation shall be fifty thousand, and the amount of each share shall be One Hundred Dollars.

In witness whereof, we have hereunto signed our names this fifteenth day of February, A. D. 1886.

ROBERT D. McFADON.
WILLIAM A. GARDNER.
HENRY A. GARDNER.
JOHN I. THOMPSON.
ADOLPHUS F. SCHIFFMAN.

(Duly acknowledged.)

UNITED STATES OF AMERICA,
State of Illinois, ss:

OFFICE OF SECRETARY.

I, Henry D. Dement, Secretary of State of Illinois, do hereby certify that the foregoing Articles of Incorporation of the Minnesota and Northwestern Railroad Company were filed for record in the office of the Secretary of State of the State of Illinois, on the twenty-fifth day of February, A. D. 1886, at 9 o'clock A. M., and duly recorded in Book No. 6, of Railroad Records, at page 224.

In witness whereof, I hereunto set my hand and affix the Great Seal of State, at the City of Springfield, this 25th day of February, A. D. 1886.

[Seal of the State of Illinois.]

HENRY D. DEMENT,
Secretary of State.

195 DEFENDANT'S EXHIBIT 4.

This indenture, made this 27th day of December, A. D. 1886, between the Minnesota & Northwestern Railroad Company, a corporation incorporated, organized and existing under and by virtue of the laws of the State of Illinois, party of the first part, and The Metropolitan Trust Company, of the City of New York, and Robert H. Benson, of London, England, parties of the second part, witnesseth:

Whereas, the Minnesota & Northwestern Railroad Company, of Minnesota, a corporation duly incorporated, organized and existing under and by virtue of the laws of the State of Minnesota, heretofore on or about the first day of July, A. D. 1884, executed and delivered to said Metropolitan Trust Company, of the City of New York, and Robert H. Benson, of London, England, as trustees, a certain mortgage or deed of trust, bearing date upon the said first day of July, A. D. 1884, by which the said Minnesota Company conveyed and mortgaged to said trustees, all its railroad and

property, then owned and thereafter to be acquired by it; which mortgage constitutes a first lien and incumbrance upon all the property, present and prospective, of the said Minnesota Company, which said mortgage secures all the bonds heretofore issued or hereafter to be issued by the said Minnesota & Northwestern Railroad Company, of Minnesota, under and pursuant to the provisions of said mortgage, which said bonds bear even date with said mortgage,
are styled "First Mortgage Five Per Cent Gold Bonds," and
196 are of the amount of one thousand dollars each, and numbered consecutively from one upward. Said bonds are issued and to be issued as specified therein and in said mortgage.

And whereas, the railway of the said Minnesota Company mortgaged as aforesaid, extends from the City of St. Paul, State of Minnesota, in a southerly and southeasterly direction to the City of Dubuque, State of Iowa, where it will connect at the boundary line of the State of Illinois with the line of railroad now being constructed by this company from Chicago to East Dubuque, hereinafter described, and the intention is to operate the lines of said Minnesota Company aforesaid and the said lines of this company as one continuous line of railroad from the cities of St. Paul and Minneapolis, Minnesota, to the City of Chicago, Illinois, which can be done advantageously for the interests of the companies named and of the public;

And whereas, the Illinois Company, for the purpose of raising means to construct and equip its road, has issued and sold twenty-five thousand (25,000) shares of its capital stock, the proceeds of which it has invested in buying right of way and material and labor used in and about the construction of a section of railway one hundred miles in length, extending from a junction with the railway of the Chicago & Great Western Railway Company in the County of Cook, in the State of Illinois, westward to a junction with the Illinois Central Railway near Freeport, in the County of Stephenson, in the State of Illinois, which section it has now
197 under construction and very nearly completed; and it has expended in and about said construction a large sum of money in addition to the proceeds derived from said stock which it has borrowed from the said Minnesota Company, and for which it is now indebted to said company, and it will require the expenditure of a further sum of money to complete said line and equip the same, which sum the said Minnesota Company has agreed to advance and pay; and the Minnesota Company has purchased all of the stock of the Illinois Company now outstanding, except one share issued to and owned by each director of the company, and has paid for the same at par;

And whereas, this company, party of the first part, has been unable to raise funds to construct and equip its line of railroad herein described, and for that purpose the said Minnesota Company has, at its request, issued, and has agreed to issue, with respect to the railroad which the party of the first part is authorized to construct, and hereinafter described, the first mortgage five per cent gold bonds of said Minnesota Company, before specially described and

referred to, to the extent and in the manner and upon the terms stated in said bonds and mortgage or deed of trust, and said Minnesota Company has applied the proceeds of said bonds so issued, and has agreed to apply the proceeds of said bonds so to be issued by it to aid the party of the first part in the construction and equipment of its line of railway herein described, as follows: First, to repay itself for advances heretofore made to the Illinois Company,
198 as aforesaid. Second, to make the further advances to be made by it, as before stated.

And the said party of the first part is indebted to the said Minnesota Company, by reason of said advances heretofore made and hereafter agreed to be made, in a sum equal to the par value of the bonds so issued and to be issued by the said Minnesota Company, with respect to said railroad of the party of the first part, constructed and to be constructed.

And whereas, the party of the first part has, by its articles of incorporation and by the laws of the State of Illinois, full power and authority to borrow money for the purpose of aiding in the construction, maintenance and operation of its railway hereinafter described, and full power and authority to secure such aid by mortgage or deed of trust of its railroad, and all its property and franchises, as well in possession as in expectancy, and to be acquired in the future, of all kinds and every nature whatsoever.

And whereas, the railway company has duly resolved to exercise its borrowing power, and has to that end, by resolution of its directors, duly passed upon the 27th day of December, A. D. 1886, and by unanimous vote of all its stockholders at a meeting of the said stockholders duly held upon the 27th day of December, A. D. 1886, duly authorized its president and secretary to execute, in its corporate name, under its corporate seal, and deliver to the parties of the second part herein, its mortgage or deed of trust, conveying
199 to the parties of the second part, all its railway and other property, real, personal or mixed, all its franchises, rights, privileges and immunities in future to be acquired, of every kind and character whatever, to secure each and every of the first mortgage bonds hereinbefore described, of the Minnesota & Northwestern Railroad Company, of Minnesota, issued, or hereafter to be issued, upon each and every the uses, purposes, trusts, conditions and stipulations specified or implied in said first mortgage, or deed of trust, of the said Minnesota Company.

Now therefore, in consideration of the promises, and of the sum of one dollar in hand paid by the parties of the second part to the party of the first part, the receipt of which is hereby acknowledged, and in compliance with said resolution of directors and vote of stockholders,

This indenture witnesseth, that the Minnesota & Northwestern Railroad Company, of Illinois, party of the first part, has granted, bargained, sold and conveyed, and by these presents does grant, bargain, sell and convey unto The Metropolitan Trust Company, of the City of New York, and Robert H. Benson, of London, England, as trustees, and their successors in this trust, all and singular, the rail-

road and railroads of the party of the first part, extending from Chicago, in the County of Cook, State of Illinois, to East Dubuque, in Joe Daviess County, in said state, passing through the counties of Cook, Du Page, Kane, De Kalb, Ogle, Stephenson and Joe
200 Daviess, constructed and to be constructed, with all the appurtenances thereto and all property used in connection therewith, together with all the easements, franchises, privileges, immunities and rights of the party of the first part; all its property, interests or rights in other railroads or railroad companies in Illinois or elsewhere, including all its property of every kind or nature whatsoever, wherever situate, real, personal or mixed; also all its railway or railways, and all other property hereafter to be acquired, with all rights, privileges, franchises, easements and immunities hereafter acquired, it being the intention hereof to convey all the property, franchises and rights of the railroad company to be hereafter acquired, as fully as if the same were in existence and possession at the date hereof, together with all the revenues, rents, tolls, incomes, issues and profits arising, or hereafter to arise, out of any property or other thing covered or hereafter covered by this mortgage.

To have and to hold, unto the said trustees, parties of the second part, and their successors in this trust, upon and to the uses and trusts, and subject in all respects to each and every the terms, stipulations, provisions and conditions stated or implied in the said first mortgage made by the said Minnesota & Northwestern Railroad Company, of Minnesota, to the parties of the second part herein as trustees, and hereinbefore more particularly referred to and described. The trustees shall hold the property hereby conveyed for the further securing according to the trusts, terms and pro-
201 visions of the first mortgage before referred to, of each, every and all the first mortgage bonds before described, issued and to be hereafter issued by the said Minnesota & Northwestern Railroad Company, of Minnesota, under and by virtue of said first mortgage or deed of trust of the said Minnesota Company.

In witness whereof, the said party of the first part, the Minnesota & Northwestern Railroad Company, has caused these presents to be signed by its president, sealed with its corporate seal, and countersigned by its secretary.

MINNESOTA & NORTHWESTERN
RAILROAD COMPANY,
By A. F. SCHIFFMAN, *President.*
W. B. BEND, *Secretary.*

[CORPORATE SEAL.]

Signed, sealed and delivered in presence of
HENRY A. GARDNER.
ROBERT D. McFADON.

(Duly acknowledged.)

DEFENDANT'S EXHIBIT 5.

Articles of Incorporation of Chicago, St. Paul and Kansas City Railway Company.

We, Ansel Oppenheim, Sam C. Stickney, A. F. Schiffman, Frank Skipwith, Robt. C. Wight, W. H. Knowlton and Geo. B.
202 Burch, hereby organize ourselves into a corporation and adopt the following articles, to-wit:

Article I.

The name of this corporation shall be Chicago, St. Paul and Kansas City Railway Company, and the principal place for the transaction of its business shall be at the City and County of Dubuque, in the State of Iowa.

Article II.

The object and general nature of the business of this corporation shall be to construct, lease, purchase and operate railway and telegraph lines in the States of Iowa, Illinois, Minnesota, Wisconsin, Missouri, Kansas and Nebraska, and to construct, lease, purchase and operate a line of railway and telegraph from the northeast portion of the state of Iowa southwesterly to the Missouri river, in the State of Missouri or Nebraska, and such branches thereto as may be hereafter determined upon by the Board of Directors.

Article III.

The capital stock of this corporation is hereby declared to be twenty-five millions of dollars, to be paid in at such times and in such manner as the Board of Directors may require.

Article IV.

This corporation shall commence on the 26th day of May, 1886, and shall terminate fifty years thereafter.

203 Article V.

The affairs of this corporation shall be conducted by a board of seven directors, who shall elect from their own number a president and vice president, and shall have power to appoint a secretary and treasurer and such other officers and agents as they may deem necessary.

Article VI.

The highest amount of indebtedness to which this corporation is at any time to subject itself is fixed at sixteen millions of dollars.

Article VII.

The private property of the individual stockholders shall be exempt from corporate debts.

Article VIII.

The first board of directors shall consist of Ansel Oppenheim, Sam C. Stickney, A. F. Schiffman, Frank Skipwith, Robt. C. Wight, W. H. Knowlton and Geo. B. Burch, who shall hold their offices respectively until their successors shall be elected and qualified. The first annual meeting of the stockholders of this corporation shall be held at the office of the Company, at Dubuque, Iowa, on the first Thursday of June, 1887, for the election of directors and other business, and annually thereafter.

Article IX.

This corporation hereby assumes all the powers granted to bodies corporate as expressly provided in Title IX., Chapter 1, Section 1059, of the Code of Iowa of 1873.

204 Article X.

The board of directors may meet for the transaction of business in any state named in these articles, or in the City of New York on such notice as may be provided by the by-laws of the corporation.

Witness our hands hereto set this 26th day of May, 1886.

ANSEL OPPENHEIM.
SAM C. STICKNEY.
A. F. SCHIFFMAN.
FRANK SKIPWITH.
ROBT. C. WIGHT.
W. H. KNOWLTON.
GEO. B. BURCH.

STATE OF IOWA,
County of Dubuque:

Before me, a notary public in and for Dubuque County, Iowa, on this 26th day of May, 1886, personally came Ansel Oppenheim, Sam C. Stickney, A. F. Schiffman, Frank Skipwith, Robt. C. Wight, W. H. Knowlton and Geo. B. Burch, each to me personally known to be the identical persons who signed the foregoing articles of incorporation as corporators, and each acknowledged the signing the same to be his voluntary act.

Witness my hand and official seal of office the day and year aforesaid.

[NOTARIAL SEAL.]

D. E. LYON,
Notary Public of Iowa in and for said County.

205 The above articles were duly filed in the office of the Recorder of Deeds of Dubuque County, on May 26th, 1886, Book 2, pp. 282-3 and 4, and in the office of the Secretary of State of Iowa, June 10, 1886, Book U, *pp.* 84, and published in the Dubuque Weekly Times, June 16, 23 and 30, July 7 and 14, 1886.

Also filed in office of Secretary of State of Minnesota, on January 9, 1888—Record Book, p. 562.

DEFENDANT'S EXHIBIT 6.

Certificate of Change of Articles of Incorporation of the Chicago, St. Paul and Kansas City Railway Company.

The undersigned, A. B. Stickney, President, M. C. Woodruff, Secretary, and W. B. Bend, Treasurer, of the Chicago, St. Paul and Kansas City Railway Company, hereby state and certify that at a regular meeting of the stockholders of said Railway Company, held in the City of Dubuque, Iowa, on the 4th day of September, A. D. 1890, Article Five (5), of the Articles of Incorporation of the Chicago, St. Paul and Kansas City Railway Company was amended by resolution of the stockholders of said corporation, duly passed by affirmative vote of all the stockholders voting at such meeting, casting the vote of a majority of all the corporate stock, which resolution was as follows:

"Resolved, that Article Five (5), of the Articles of Incor-
206 poration of the Chicago, St. Paul and Kansas City Railway Company be and is hereby amended so as to read as follows:

Article V.

The affairs of this corporation shall be conducted by a Board of Fifteen (15) Directors, who shall elect from their own number a President and Vice President, and shall have power to appoint a Secretary and Treasurer and such other officers and agents as they may deem necessary."

Said amendment was duly passed and is now effective.
Dated September 4th, 1890.

(Signed) A. B. STICKNEY,
President.

(Signed) M. C. WOODRUFF,
Secretary.

(Signed) W. B. BEND,
Treasurer.

[Corporate seal of the Chicago, St. Paul and Kansas City Railway Company.]

207 DEFENDANT'S EXHIBIT 7.

Articles of Incorporation of the Chicago Great Western Railway Co.

The undersigned, for the purpose of becoming an incorporated company, under and by virtue of an act of the general assembly of the State of Illinois, entitled "An act to provide for the incorporation of associations that may be organized for the purpose of constructing railways, maintaining and operating the same; for prescribing and defining the duties and limiting the powers of such corporation when so organized," approved and in force March 1,

1872, and other acts supplementary thereof, do hereby adopt and sign these articles of association or incorporation.

First. The name of this corporation shall be the: "Chicago Great Western Railway Company."

Second. It is proposed to construct the said railway from a point on the boundary line of the states of Illinois and Indiana, at or near the southeast corner of section five, in township thirty-six, north, of range fourteen east of the third principal meridian, on such line as may be selected to a point in the west line of section seven, in township thirty-seven north, range thirteen east, of the third principal meridian; thence northerly on such line as may be selected to the northwest corner of section nineteen, in township thirty-eight, north, range thirteen east, of the third principal meridian;
208 thence on such line as may be selected to a junction with the Minnesota & Northwestern Railroad at or near the north line of section fifteen, in township thirty-nine, north, range twelve, east, of the third principal meridian; thence on such line as may be selected in a northerly and easterly direction to a point on the shore of Lake Michigan in section thirty-two, in township forty-one, north, range fourteen, east, of the third principal meridian; with a branch connecting with said line at or near the southwest corner of section thirty, in township thirty-eight, north, range thirteen, east, of the third principal meridian, in an easterly direction, on such line as may be selected, to the shores of Lake Michigan at or near the mouth of the Calumet river, all in Cook county, Ill.; also to construct yards and other terminal facilities which may be necessary or convenient; also, to purchase, lease or otherwise acquire other railways in the State of Illinois or elsewhere and operate the same; and also, to purchase, own and hold in accordance with the laws of the State of Illinois, the stocks and securities of corporations owning connecting railways, or such part thereof as it may by law be authorized to hold.

Third. The principal office of this corporation shall be established and maintained at the city of Chicago, in the county of Cook and State of Illinois.

Fourth. The time of commencement of this corporation shall be the eleventh day of January, 1892, and continue in force for fifty years.

Fifth. The amount of capital stock of this corporation
209 shall be ninety millions of dollars, divided into three classes, thirty millions of which shall be known as First Preferred Stock, thirty millions as Preferred Stock and thirty millions as Common Stock. The First Preferred Stock shall be entitled to a cumulative dividend at the rate of four per cent per annum, payable in gold coin, in the City of New York, semi-annually on the first days of January and July of each year, to the holders of record on the first days of the preceding December and June, and the whole net income of the corporation applicable to dividends may be pledged, in such manner as the Board of Directors may deem advisable, for the payment of these dividends. And no dividends on any other stock of the Company shall be paid in any year until all ac-

crued dividends on the First Preferred Stock shall have been paid or provided for. No mortgage shall be made upon any railway owned by the Company while any of the said First Preferred Stock is outstanding, without the consent, in such manner as may be provided by the by-laws of the corporation, of two-thirds in amount of the holders of said First Preferred Stock.

The Preferred Stock shall be entitled to such dividends (non-cumulative), payable out of the net earnings of the Company, as the Board of Directors may from time to time declare, not exceeding five per cent for any one calendar year, and no dividend shall be declared or paid on the Common Stock of the Company in any one calendar year until the dividend of five per cent for such year
210 shall have been declared and provided for upon the Preferred Stock then outstanding, and after six per cent shall have been paid on the Common Stock in any one year, any surplus earnings of the Company applicable to dividends on the Preferred and Common Stocks, if the Directors shall deem it best to divide such surplus earnings, shall be divided pro rata between the Preferred and Common Stocks of the Company.

It is expressly agreed, however, that said corporation shall be fully organized and entitled to enter upon the construction of its railway and do all other business authorized by the laws of the State of Illinois when two million of dollars, or more, of its Capital Stock shall be subscribed for, or purchased and paid for, and that the remaining stock may be issued from time to time as it may be required to carry out the purposes of the Company.

Sixth. The names and places of residence of the several persons forming this corporation are:

Names.	Residence.
John L. Pratt	Sycamore, Illinois
Samuel C. Stickney	Chicago, Illinois
Henry A. Gardner	Chicago, Illinois
William A. Gardner	Chicago, Illinois
Parke E. Simmons	Chicago, Illinois
Robert C. Wight	St. Paul, Minnesota
Charles Nichols	St. Paul, Minnesota
Raymond Du Puy	St. Paul, Minnesota
Emerson Hadley	St. Paul, Minnesota

211 Seventh. The names of the first Board of Directors are:

John L. Pratt,
Samuel C. Stickney,
Henry A. Gardner,
William A. Gardner,
Parke E. Simmons,
Robert C. Wight,
Charles Nichols,
Raymond Du Puy,
Emerson Hadley,

and the government of the corporation shall be vested in the Board of Directors, consisting of nine stockholders, who may appoint or elect such officers and agents as they may deem necessary to carry on the business of said corporation, and delegate such powers and duties as they may think proper, not inconsistent with the laws.

Eighth. The capital stock of this corporation shall be divided into 900,000 shares of one hundred dollars each, of which:

300,000 shares shall be known as First Preferred Stock,
300,000 shares shall be known as Preferred Stock, and
300,000 shares shall be known as Common Stock.

In witness whereof, we have hereunto severally subscribed our names, this fifth day of January, A. D. 1892.

JOHN L. PRATT,
SAMUEL C. STICKNEY,
HENRY A. GARDNER,
WILLIAM A. GARDNER,
PARKE E. SIMMONS,
ROBERT C. WIGHT,
CHARLES NICHOLS,
RAYMOND DU PUY,
EMERSON HADLEY.

212 DEFENDANT'S EXHIBIT 8.

STATE OF ILLINOIS,
County of Cook, ss:

This is to certify, that at a meeting of the stockholders of the Chicago Great Western Railway Company, held at the office of said Company in the City of Chicago, Illinois, on the 20th day of June, 1892, which was duly called and advertised and notice thereof given in pursuance of law, all of the stock of said corporation was represented either in person or by proxy; that at said meeting the articles of incorporation of said Company were amended, thereby increasing the capital stock, and changing the form thereof to read as follows:

Articles of Incorporation of the Chicago Great Western Railway Company.

The undersigned, for the purpose of becoming an incorporated Company, under and by virtue of an act of the general assembly of the State of Illinois, entitled "An act to provide for the incorporation of associations that may be organized for the purpose of constructing railways, maintaining and operating the same; for prescribing and defining the duties and limiting the powers of such corporation when so organized," approved and in force March 1, 1872, and other acts supplementary thereof, do hereby adopt and sign these articles of association or incorporation.

First. The name of this corporation shall be the: "Chicago
213 Great Western Railway Company."

Second. It is proposed to construct the said railway from a point on the boundary line of the State of Illinois and Indiana, at or near the southeast corner of section five, in township thirty-six,

north of range fourteen east, of the third principal meridian, on such line as may be selected to a point in the west line of section seven, in township thirty-seven north, range thirteen east, of the third principal meridian; thence northerly on such line as may be selected to the northwest corner of section nineteen, in township thirty-eight north, range thirteen east of the third principal meridian; thence on such line as may be selected to a junction with the Minnesota & Northwestern Railroad at or near the north line of section fifteen, in township thirty-nine north, range twelve east, of the third principal meridian; thence on such line as may be selected in a northerly and easterly direction to a point on the shore of Lake Michigan, in section thirty-two, in township forty-one north, range fourteen east of the third principal meridian; with a branch connecting with said line at or near the southwest corner of section thirty, in township thirty-eight north, range thirteen east of the third principal meridian, in an easterly direction, on such line as may be selected, to the shores of Lake Michigan at or near the mouth of the Calumet river, all in Cook county, Ill.; also, to construct yards and other terminal facilities which may be necessary or convenient; also, to purchase, lease or otherwise acquire the same; and also, to pur-
214 chase, own and hold in accordance with the laws of the State of Illinois, the stocks and securities of corporations owning connecting railways, or such part thereof as it may by law be authorized to hold.

Third. The principal office of this corporation shall be established and maintained at the City of Chicago, in the County of Cook and State of Illinois.

Fourth. The time of commencement of this corporation shall be the eleventh day of January, 1892, and continue in force for fifty years.

Fifth. The amount of capital stock of this corporation shall be one hundred million of dollars, divided into three classes; thirty million dollars of which shall be known as First Preferred Guaranteed 4 per cent Dividend Stock, thirty million dollars as Preferred Stock, and forty million dollars as Common Stock. The First Preferred Guaranteed 4 per cent. Dividend Stock shall be entitled to a cumulative dividend at the rate of four per cent per annum only, payable out of net earnings applicable to dividends in gold coin, in the City of New York, semi-annually, on the first day of January and July of each year, to the stockholders of record on the first days of the preceding December and June, and the whole net income of the corporation applicable to dividends is hereby pledged for the payment of these dividends, so that no dividends on any of the other stocks of the Company shall be paid until all approved dividends on the First Preferred Guaranteed 4 per cent Dividend Stock
215 shall have been paid or provided for. No mortgage shall be made upon any railway owned by the Company, without the consent in such manner as may be provided by its by-laws of two-thirds in amount of the said First Preferred Guaranteed 4 per cent Dividend Stock.

The Preferred Stock shall be entitled to such dividends (non-cumulative), payable out of the net earnings of the Company as the Board of Directors may from time to time declare, not exceeding five per cent for any one calendar year, and no dividend shall be declared or paid on the Common Stock of the Company in any one calendar year until the dividend of five per cent for such year shall have been declared and provided for upon the Preferred Stock then outstanding, and after six per cent shall have been paid on the Common Stock in any one year, any surplus earnings of the Company applicable to dividends on the Preferred and Common Stocks, if the Directors shall deem it best to divide such surplus earnings, shall be divided pro rata between the Preferred and Common Stocks of the Company.

It is expressly agreed, however, that said corporation shall be fully organized and entitled to enter upon the construction of its railway and do all other business authorized by the laws of the State of Illinois when two million of dollars or more of its capital stock shall be subscribed for, or purchased and paid for, and that the remaining stock may be issued from time to time as it may be required to carry out the purposes of the Company.

216 Sixth. The names and places of residence of the several persons forming this corporation are:

Names.	Residences.
John L. Pratt	Syracuse, Illinois.
Samuel C. Stickney	Chicago, Illinois.
Henry A. Gardner	Chicago, Illinois.
William A. Gardner	Chicago, Illinois.
Parke E. Simmons	Chicago, Illinois.
Robert C. Wight	St. Paul, Minnesota.
Charles Nichols	St. Paul, Minnesota.
Raymond Du Puy	St. Paul, Minnesota.
Emerson Hadley	St. Paul, Minnesota.

Seventh. The names of the first Board of Directors are:

John L. Pratt,
Samuel C. Stickney,
Henry A. Gardner,
William A. Gardner,
Parke E. Simmons,
Robert C. Wight,
Charles Nichols,
Raymond Du Puy,
Emerson Hadley,

and the government of the corporation shall be vested in the Board of Directors, consisting of nine stockholders, who may appoint or elect such officers and agents as they may deem necessary to carry on the business of said corporation, and delegate such powers and duties as they may think proper, not inconsistent with the laws.

Eighth. The capital stock of this corporation shall be divided into 1,000,000 shares of one hundred dollars each, of which

300,000 shares shall be known as First Preferred Guaranteed 4 per cent Dividend Stock.

217 300,000 shares shall be known as Preferred Stock, and

400,000 shares shall be known as Common Stock.

In witness whereof, we have hereunto severally subscribed our names, this fifth day of January, A. D. 1892.

JOHN L. PRATT.
SAMUEL C. STICKNEY.
HENRY A. GARDNER.
WILLIAM A. GARDNER.
PARKE E. SIMMONS.
ROBERT C. WIGHT.
CHARLES NICHOLS.
RAYMOND DU PUY.
EMERSON HADLEY.

In witness whereof, the Chicago Great Western Railway Company has caused this certificate to be signed by its President and its corporate seal to be attached hereto, attested by its Secretary, this 21st day of June, 1892.

CHICAGO GREAT WESTERN RAILWAY COMPANY.
By RAYMOND DU PUY, *President.*

[CORPORATE SEAL.]

Attest:
ROBERT C. WIGHT, *Secretary.*

218 STATE OF MINNESOTA,
County of Ramsey, ss:

On this 22d day of June, 1892, personally appeared before me, a notary public, Raymond Du Puy and Robert C. Wight, personally known to me, and who are also personally known to me to be the identical persons whose names are affixed to the foregoing instrument as the President and Secretary of the Chicago Great Western Railway Company, who being by me first duly sworn did depose and say that the articles of incorporation of the Chicago Great Western Railway Company as amended at a meeting of the stockholders held on Monday, June 20, 1892, are as shown in the attached copy subscribed to by them.

Witness my hand and official seal this 22d day of June, 1892.

GREGORY BOLT,
[NOTARIAL SEAL.] *Notary Public, Ramsey Co., Minn.*

UNITED STATES OF AMERICA,
State of Illinois, ss:

OFFICE OF SECRETARY.

I, Isaac N. Pearson, Secretary of State of the State of Illinois, do hereby certify that the foregoing Amended Articles of Incorporation of the Chicago Great Western Railway Company were filed for record
219 in the office of the Secretary of State of the State of Illinois, on the 12th day of August, A. D. 1892, at eight o'clock A. M., and duly recorded in Book No. 11, of Railroad Records, at page 320.

In witness whereof, I hereto set my hand and affix the Great Seal of State, at the City of Springfield, this 12th day of August, A. D. 1892.

I. N. PEARSON,
Secretary of State.

[Seal of the State of Illinois.]

DEFENDANT'S EXHIBIT 9.

STATE OF ILLINOIS,
County of Cook, ss:

This is to certify, That at a meeting of the stockholders of the Chicago Great Western Railway Company, held at the office of said Company, in the City of Chicago, Illinois, on the 2nd day of November, A. D. 1892, which was duly advertised and notice thereof given in pursuance of law, all of the stock of said corporation was represented either in person or by proxy; that at said meeting the Articles of Incorporation of said Company were amended, thereby decreasing the capital stock, and changing the form thereof to read as shown on the pages following:

220 *Articles of Incorporation of the Chicago Great Western Railway Company.*

The undersigned, for the purpose of becoming an incorporated company, under and by virtue of an act of the general assembly of the State of Illinois, entitled "An act to provide for the incorporation of associations that may be organized for the purpose of constructing railways, maintaining and operating the same; for prescribing and defining the duties and limiting the powers of such corporation when so organized," approved and in force March 1, 1872, and other acts supplementary thereof, do hereby adopt and sign these articles of association or incorporation.

First. The name of this corporation shall be the: "Chicago Great Western Railway Company."

Second. It is proposed to construct the said railway from a point on the boundary line of the States of Illinois and Indiana, at or near the southeast corner of section five, in township thirty-six, north, of range fourteen, east, of the third principal meridian, on such line as may be selected to a point in the west line of section seven, in township thirty-seven, north, range thirteen, east, of the third principal meridian; thence northerly on such line as may be selected to the northwest corner of section nineteen, in township thirty-eight, north, range thirteen, east, of the third principal meridian;
221 thence on such line as may be selected to a junction with the Minnesota & Northwestern Railroad at or near the north line of section fifteen, in township thirty-nine, north, range twelve, east, of the third principal meridian; thence on such line as may be selected in a northerly and easterly direction to a point on the shore

of Lake Michigan in section thirty-two, in township forty-one, north, range fourteen, east, of the third principal meridian; with a branch connecting with said line at or near the southwest corner of section thirty, in township thirty-eight, north, range thirteen, east, of the third principal meridian, in an easterly direction, on such line as may be selected, to the shores of Lake Michigan at or near the mouth of the Calumet river, all in Cook county, Ill.; also, to construct yards and other terminal facilities which may be necessary or convenient; also, to purchase, lease or otherwise acquire other railways in the State of Illinois or elsewhere and operate the same; and also, to purchase, own and hold, in accordance with the laws of the State of Illinois, the stocks and securities of corporations owning connecting railways, or such part thereof as it may by law be authorized to hold.

Third. The principal office of this corporation shall be established and maintained at the City of Chicago, in the County of Cook and State of Illinois.

Fourth. The time of commencement of this corporation shall be the eleventh day of January, 1892, and continue in force for
222 fifty years.

Fifth. The amount of Capital Stock of this corporation shall be seventy million dollars, divided into four classes, fifteen million dollars of which shall be known as four per cent Debenture Stock; fifteen million dollars as five per cent Preferred Stock A; ten million dollars as four per cent Preferred Stock B, and thirty million dollars as Common Stock.

On the fifteenth day of January, 1893, and on every fifteenth day of July and January thereafter, the Company agrees to pay in gold to the holders of record on the last day of the preceding December and June, of the four per cent Debenture Stock, two per cent interest for the preceding half year, (ending 31st December and 30th June,) making an aggregate of four per cent per annum. In consideration of this guaranteed interest the holders of said stock shall not be entitled to participate further in the earnings of the Company; but it is expressly agreed that no dividends shall be paid upon subordinate stocks of the Company until all accrued interest upon the four per cent Debenture Stock shall have been paid or provided for.

As to the five per cent Preferred Stock A, inasmuch as the financial year runs from 1st July to 30th June, and the net earnings are usually more in the half year ending 31st December than in the half year ending 30th June, the Company agrees as soon as practicable to make up an accurate statement of its earnings and expenses for each half year, and the balance of earnings over expenses
223 shall be considered the net earnings of the Company for that half year. Out of such net earnings in each half year all prior charges and interest on the Debenture Stock shall be paid or provided for. The surplus in the half year ending 31st December up to an amount sufficient to pay 2½% dividend in gold on the five per cent Preferred Stock A, shall be applied for that purpose, and any further surplus shall be carried forward to the next half year; the ultimate balance of net earnings in each year ending the 30th

June, after payment of interest on the Debenture Stock and 5% in gold on the Preferred Stock A, shall be applicable to dividends on the four per cent Preferred Stock B and the Common Stock of the Company.

The four per cent Preferred Stock B shall be entitled to such dividend, (non-cumulative,) payable out of the balance of net earnings of the Company applicable to such dividends, as the Board of Directors from time to time declare, not exceeding four per cent in any fiscal year, before any dividends shall be paid upon the Common Stock; and after four per cent shall have been paid in any fiscal year upon the Common Stock, any balance of surplus earnings applicable to dividends upon the Preferred Stock B and the Common Stock, shall, if the Directors deem it best to divide such surplus, be divided pro rata between the Preferred Stock B and the Common Stock.

It is expressly agreed, however, that said corporation shall be fully organized and entitled to enter upon the construction of its
224 railway and do all other business authorized by the laws of the State of Illinois when two million of dollars, or more, of its Capital Stock shall be subscribed for, or purchased and paid for, and that the remaining stock may be issued from time to time as it may be required for the purposes of the Company.

In case of liquidation, the net assets of the Company shall be applied to the payment in gold of the capital of the different classes of stock or securities, in the same order of priority as the interest or dividends on such stock or securities are provided to be paid.

Sixth. The names and places of residence of the several persons forming this corporation:

Names.	Residence.
John L. Pratt	Sycamore, Illinois.
Samuel C. Stickney	Chicago, Illinois.
Henry A. Gardner	Chicago, Illinois.
William A. Gardner	Chicago, Illinois.
Parke E. Simmons	Chicago, Illinois.
Robert C. Wight	St. Paul, Minnesota.
Charles Nichols	St. Paul, Minnesota.
Raymond Du Puy	St. Paul, Minnesota.
Emerson Hadley	St. Paul, Minnesota.

Seventh. The names of the first Board of Directors are:

John L. Pratt,
Samuel C. Stickney,
Henry A. Gardner,
William A. Gardner,
Parke E. Simmons,
Robert C. Wight,
Charles Nichols,
Raymond Du Puy,
Emerson Hadley.

225 And the government of the corporation shall be vested in the Board of Directors, consisting of nine stockholders, who may appoint or elect such officers and agents as they may deem necessary to carry on the business of said corporation, and delegate

such powers and duties as they may think proper, not inconsistent with the laws.

Eighth. The Capital Stock of this corporation shall be divided into 700,000 shares of one hundred dollars each, of which:

150,000 shares shall be known as four per cent Debenture Stock
150,000 shares shall be known as five per cent Preferred Stock A
100,000 shares shall be known as four per cent Preferred Stock B
300,000 shares shall be known as Common Stock.

In Witness Whereof, We have hereunto severally subscribed our names, this fifth day of January, A. D. 1892.

JOHN L. PRATT.
SAMUEL C. STICKNEY.
HENRY A. GARDNER.
WILLIAM A. GARDNER.
PARKE E. SIMMONS.
ROBERT C. WIGHT.
CHARLES NICHOLS.
RAYMOND DU PUY.
EMERSON HADLEY.

In Witness Whereof, The Chicago Great Western Railway Company has caused this certificate to be signed by its President
226 and its corporate seal to be attached hereto, attested by its Secretary, this 8th day of November, 1892.

CHICAGO GREAT WESTERN RAILWAY COMPANY.
By JOHN M. EGAN, *President.*

[CORPORATE SEAL.]

Attest:
ROBT. C. WIGHT, *Secretary.*

DEFENDANT'S EXHIBIT 10.

This Indenture, Made this twenty-seventh day of December, 1886 by and between the Minnesota & Northwestern Railroad Company a corporation duly formed and organized under and by virtue of the General Statutes of the State of Illinois, party of the first part hereinafter, for convenience, called the Illinois Company, and the Minnesota & Northwestern Railroad Company, a corporation duly formed, organized and existing under and by virtue of the laws of the State of Minnesota, party of the second part, hereinafter, for convenience, referred to as the Minnesota Company, Witnesseth:

Whereas, The Illinois Company is a corporation duly incorporated by articles of association or incorporation, duly signed and adopted on the fifteenth day of February, 1886, under and by virtue of an act of the General Assembly of the State of Illinois, entitled "An act to provide for the incorporation of associations that may be organized for the purpose of constructing railways, maintaining
227 and operating the same, for prescribing and defining the duties and limiting the powers of said corporations when so

organized," approved and in force March 1, 1872, and other acts supplementary thereto and amendatory thereof, for the purpose of constructing, maintaining and operating a railway in the State of Illinois, from the city of Chicago, in the county of Cook, to East Dubuque, in Jo Daviess County, in said State.

And Whereas, The Minnesota Company is a corporation duly organized and existing under the laws of the State of Minnesota, and is now the owner of a line of road extending from the city of St. Paul, in said State of Minnesota, southeasterly to the city of Dubuque, in the State of Iowa, and of other railways in the State of Iowa, which are now fully completed, equipped and in operation.

And Whereas, The proposed line of railway of the Illinois Company when constructed will form a continuation of the line of the Minnesota Company from Dubuque to the city of Chicago, in the State of Illinois, passing through the counties of Jo Daviess, Stephenson, Ogle, De Kalb, Kane, Du Page, and Cook, so that the two lines will connect with each other upon the state line of Illinois, and together will form a continuous line of railway between the city of St. Paul, in the State of Minnesota, and the city of Chicago, in the State of Illinois, which can be conveniently operated together as one continuous line of railway, to the advantage of the public.

228 And Whereas, The said Minnesota Company has become the owner of all the stock of said Illinois Company, except one share owned by each of the directors of the Illinois Company, and the Minnesota Company has advanced to the Illinois Company all the moneys expended, and has agreed to further advance to the Illinois Company all the moneys to be hereafter expended in the construction of the line of railway which the Illinois Company is authorized to construct, and the Illinois Company is indebted to the Minnesota Company for the moneys so advanced and agreed to be advanced, and it is deemed for the best interests of both companies that the two railroads should be operated as one railway by the said Minnesota Company.

And Whereas, The stockholders of the Illinois Company, at a meeting duly called, and held at the office of the company, in the city of Chicago, in the State of Illinois, on the twenty-seventh day of December, 1886, at which every share of the said capital stock was represented and voting, by unanimous vote of all the stock of said company, did duly authorize and empower the president and secretary of said company to make, execute and deliver to the Minnesota Company a lease of all the property owned by the Illinois Company; and the board of directors of the Illinois Company, at a meeting duly called, and held at the office of said company, in the City of Chicago, upon the same day, all of said directors being present and voting, did, by unanimous vote, also authorize the president and secretary to make, execute and deliver said lease.

229 And Whereas, At both the aforesaid meetings of the stockholders and directors, a draft of this instrument was presented and read at each of said meetings, and the stockholders and directors at their respective meetings aforesaid, did duly and unanimously

consent to and approve the same, and to each and every agreement herein contained, and did unanimously authorize and direct the president and secretary to execute and deliver the same to the Minnesota Company, as the act and deed of the Illinois Company.

Now, Therefore, Said first party, in consideration of the premises and of the sum of one dollar to it in hand paid by the said second party, the receipt of which is hereby acknowledged, and in further consideration of the covenant and agreements herein contained, has let, demised and leased, and hereby does let, demise and lease unto said second party, all the railroad of the first party, located and to be located, constructed and to be constructed, from the city of Chicago, county of Cook, State of Illinois, to East Dubuque, in Jo Daviess County, in said State, passing through the counties before named, including all the railways, ways and rights of way, and all depot grounds and other lands, all the tracks, bridges, viaducts, culverts, fences and other structures, all the depots, station houses, engine houses, car houses, freight houses, wood houses, coal houses, and other buildings, and all machine shops and other shop held or acquired for use in connection with the said railway, or in
230 connection with the business thereof, including roadbed, right of way, appurtenances, and all property of every kind and description belonging or appertaining to the railway hereby conveyed and before described, together with all and singular the tenements, hereditaments, appurtenances to the said railway and premises, and the reversion and reversions, remainder and remainders, tolls, incomes, rents, issues and profits thereof, and any and all telegraph line or lines, posts, instruments, and all other property, rights, easements therewith connected, now contructed or which may be hereafter constructed, hereby assigning also all contracts, rights and rights of action, belonging or to belong to the said first party; and also the right to maintain, operate and enjoy any and all railroad constructed or to be constructed by said first party. It is hereby declared that the first party executes this lease in order to enable the second party to use the said railroad and railroads as the second party's line between St. Paul and Minneapolis, Minnesota, and Chicago, Illinois, for the transportation of persons and property by the said second party, its successors, lessees and assigns.

To have and to hold the same to the said party of the second part, its successors, lessees and assigns, for the term of nine hundred and ninety-nine years, or for the longest term of years allowed by law, not exceeding nine hundred and ninety-nine years, from and after the date of this instrument.

In Consideration Whereof, The said party of the second part, for itself and its successors and assigns, covenants and agrees
231 to pay all license fees, taxes and impositions lawfully imposed by governmental authority during said term; to keep the demised premises in good repair; to replace wornout or broken rails, bridges and other property hereby demised; to assume all liabilities arising from the operation of the said railroad during the term; and to pay the lessor on or before the first day of January of each and every year, the sum of one dollar, being the rent hereby reserved,

and to deliver to the first party at the end of the term the said demised premises in substantially as good condition as when received by the said second party.

It is further agreed that the said party of the second part is expressly authorized to issue its first mortgage bonds with respect to the railroad hereby leased, the same to be issued under and to be secured, together with all the first mortgage bonds of the second party issued and to be issued, by the first mortgage of said second party heretofore executed by the second party to the Metropolitan Trust Company, of the city of New York, and Robert H. Benson, of London, England, trustees, bearing date the first day of July, A. D. 1884. It is expressly declared that the intention hereof is that the demised premises shall become subject to and covered by the said first mortgage of the second party as fully as if the same were the absolute property of the second party, and the said party of the second part hereby covenants and agrees, in consideration of the premises, that it will pay the interest on its said first mortgage bonds as it accrues, and ultimately pay the principal thereof, and
232 save the first party harmless with respect to said bonds, and that it will, at the end of the full term of nine hundred and ninety-nine years, discharge the first party from all indebtedness to the said second party for the sums advanced and to be advanced to it for the construction of its road as aforesaid.

Now, said Illinois Company, for and on behalf of itself, its successors and assigns, does hereby covenant and agree to and with the said Minnesota Company, party of the second part, its successors and assigns, that it is seized of the property hereby leased, that it has good and lawful right, title, and authority to lease the same, and that it will make such further leases and assurances of title as may be advised or required, and that it will forever warrant and defend the title to said premises against the lawful claims of all persons.

In Witness Whereof, The said parties have caused these presents to be executed by their respective presidents, with the com-
233 mon seal of each attached, and attested by their respective secretaries, the day and year first above written.

MINNESOTA & NORTHWESTERN
RAILROAD COMPANY,
By A. E. SCHIFFMAN, *President*.
W. B. BEND, *Secretary*.

In presence of:
HENRY A. GARDNER.
ROBERT D. McFADON.

MINNESOTA & NORTHWESTERN
RAILROAD COMPANY,
By A. B. STICKNEY, *President*.
JOHN I. THOMPSON, *Secretary*.

In presence of:
HENRY A. GARDNER.
ROBERT D. McFADON.

(Duly acknowledged.)

234 DEFENDANT'S EXHIBIT 11.

Minnesota and Northwestern Railroad Company of Illinois, to Chicago Great Western Railway Co.

Deed.

This Indenture, made this 13th day of June, A. D. 1894, by and between the Minnesota and Northwestern Railroad Company, a corporation duly formed and organized under and by virtue of the laws of the State of Illinois, party of the first part, and the Chicago Great Western Railway Company, a corporation duly formed and organized under and by virtue of the laws of the State of Illinois, party of the second part, Witnesseth:

Whereas, The said Minnesota & Northwestern Railroad Company has constructed, and now owns a railroad extending from Forest Home Junction, near the City of Chicago, State of Illinois, in a westerly direction, to a connection with the Chicago, Burlington & Northern Railway, at Aitken Junction, Illinois, in all about one hundred and forty-six miles of single track railroad:

Now Therefore, In consideration of the sum of one dollar to it in hand paid, the Minnesota & Northwestern Railroad Com-
235 pany does hereby grant, bargain, sell, assign, convey and transfer to the Chicago Great Western Railway Company, and to its successors and assigns forever, all and singular, the railroads and railways of the said party of the first part, now constructed and in process of construction, its right of way, road bed, bridges, culverts, depots, coal houses, warehouses, water tanks, stock yards fences and other structures and buildings; all its tools machinery and implements; all its telegraph lines, wires and instruments; all its leases, contracts, rights, privileges and immunities; all its choses in action; accounts, bills, notes and moneys, and generally all its property, real, personal and mixed; of every kind, nature and description; as fully as if specifically enumerated herein, together with all the tolls, income, issues, rents and revenues of said property, and all appurtenances thereto.

To Have and To Hold unto the said party of the second part, its successors and assigns forever.

In Testimony Whereof, the Minnesota & Northwestern Railroad Company of Illinois has caused its corporate seal to be hereto affixed, and these presents to be signed by its President and Secretary the day and year first above written.

MINNESOTA & NORTHWESTERN RAILROAD COMPANY,

By —— ——, *President.*

—— ——, *Secretary.*

Signed, sealed and delivered in presence of:

—— ——.

236 DEFENDANT'S EXHIBIT 12.

This Indenture, Made this first day of July, in the year of our Lord one thousand eight hundred and eighty-six, between the Chicago, St. Paul and Kansas City Railway Company, a corporation incorporated, organized and existing under and by virtue of the general statutes of the State of Iowa, party of the first part, and The Metropolitan Trust Company of The City of New York, a corporation duly incorporated, organized and existing under the laws of the State of New York, and Robert H. Benson, of London, England, parties of the second part.

Witnesseth: Whereas, The Chicago, St. Paul and Kansas City Railway Company, hereinafter referred to as "The Railway Company," is duly incorporated and existing under the laws of the State of Iowa, and under and by virtue of its articles of incorporation and the laws of the State of Iowa has full power and authority to construct, lease, purchase and operate railway and telegraph lines in the States of Iowa, Illinois, Minnesota, Wisconsin, Missouri, Kansas and Nebraska, and to construct, lease, purchase and operate a line of railway and telegraph from the northeast portion of the State of Iowa, southwesterly to the Missouri River in the State of Missouri or Nebraska and such branches thereto as may be hereinafter determined upon by the Board of Directors, and

Whereas, The said Chicago, St. Paul and Kansas City Railway Company is in and by the general laws of the State of Iowa
237 authorized to borrow money for the purpose of enabling it to acquire by purchase or consolidation or otherwise, and to construct, complete, improve, equip and operate such railways as it may purchase, construct or otherwise acquire, and to secure money borrowed by it, and for the purpose of raising funds from time to time, the said Railway Company is, by virtue of the said general laws of the State of Iowa, duly authorized and empowered to issue its corporate bonds in sums not less than fifty dollars each, payable to bearer or otherwise, and bearing interest at a rate not exceeding ten per centum per annum, and to sell the said bonds at such rates or prices as the said Railway Company shall deem proper, in such form and bearing such rates of interest, payable at such times and places as the Railway Company, by its Board of Directors, may direct, which bonds they may make convertible into stock, or not as may be deemed expedient, and if such bonds shall be sold below their nominal or par value they shall be valid and binding on the Company and no plea of usury shall be allowed such Corporation in any action or proceeding brought to enforce the collection of said bonds, and

Whereas, By and under the said general laws of the State of Iowa the said railway company is duly authorized and empowered to secure the payment of bonds which it is as aforesaid authorized to issue, by the execution and delivery of a mortgage or deed of trust of and upon the railway and railways so acquired or to be acquired
238 by purchase or otherwise, or constructed or to be constructed by it as aforesaid, and all other property owned or to be

owned, or acquired or to be acquired in any manner by the Railway Company within or without the said State of Iowa, and

Whereas, By said statutes it is further provided that said mortgages or deeds of trust may, by their terms include and cover not only the property of the corporation making them at the time of their date, but property both real and personal which may thereafter be acquired by them and shall be as valid and effectual for that purpose as if the property were in possession at the time of the execution thereof, and

Whereas, By said general statutes of the State of Iowa any railway corporation organized for the purpose of constructing a railway from a point within the State of Iowa may construct or extend the same into or through any other State under such regulations as may be prescribed by the laws of such State, and the rights and privileges of such corporation over such extension in the construction and use thereof, and in controlling and applying the assets shall be the same as if its railway was constructed wholly within said State, and

Whereas, The Railway Company proposes to construct certain lines of railway in the State of Iowa, and in other States, and proposes to acquire in the future by agreement, consolidation, lease or purchase, or in such other manner as it may be authorized by law, and to control and operate lines of railway which shall or may
239 be continuous with the line or lines of the Railway Company, or connect with them or either of them in the States through which they, or either of them, may be built, and proposes to acquire by purchase or otherwise such other railways as it may be authorized to acquire and as shall in the judgment of the Board of Directors or of the Executive Committee from time to time be deemed essential feeders or connections to said Railway Companys' railways, or any part thereof, and

Whereas, The said Railway Company has, deeming the same necessary and expedient, duly resolved to exercise the borrowing power conferred upon it by the general statutes of the State of Iowa for the purpose of borrowing money to be expended in the construction and equipment of its said railways and branches, and the bridges, appendages and appurtenances thereto, and in purchasing the franchises and property of other railway corporations within or without the said State of Iowa which the said Railway Company may now or hereafter have lawful right or power to purchase, lease, construct or consolidate with; also to purchase the bonds or other securities of any railroad or railroads within or without the said State of Iowa which the said Railway Company may now or hereafter have lawful right or power to purchase, own, lease, aid, or consolidate with, and for the purpose of paying up, canceling and extinguishing the bonded indebtedness which may at any time be outstanding against any railway, franchises, appurtenances or property which the said
240 Railway Company has or may hereafter purchase, lease, aid or consolidate with, and for that purpose has, by resolution of its Board of Directors, duly authorized its President and Secretary to execute in its corporate name and issue from time to time, as its Board of Directors by resolution may direct, its bonds, to be desig-

nated as "First Mortgage Five Per Cent Gold Bonds," at the rate of twenty thousand dollars per mile of railroad actually completed and in operation, including any road which has or may be hereafter purchased, leased, aided or consolidated with by the Railway Company, and an additional amount not exceeding five thousand dollars per mile for the purpose of paying for right of way, depot grounds and terminal facilities in cities having over eight thousand inhabitants, and for the purchase of rolling stock and equipment, which said last named bonds of five thousand dollars per mile shall not be issued for an amount exceeding the actual cash cost of such right of way, depot grounds and terminal facilities, rolling stock and equipment, and an additional amount, not exceeding eight thousand dollars per mile, for the purpose of building a double track upon said road or any portion thereof to be limited to eight thousand dollars per mile of double track (not including side tracks) actually constructed and in operation, which last named bonds to be issued for double track purposes shall not be issued in an amount to exceed the actual cash cost of the double track so actually constructed and put in operation, and the whole amount of bonds to be issued,
241 under this mortgage shall not exceed sixteen million dollars, and for the purpose of securing payment of the same has fully authorized its President and Secretary to execute in its corporate name and deliver to The Metropolitan Trust Company of the City of New York, and Robert H. Benson, of London, England, parties of the second part, hereinafter referred to as "the Trustees," a mortgage or deed of trust bearing date the first day of July, one thousand eight hundred and eighty-six, conveying by way of mortgage or deed of trust all the railways to be constructed by the Railway Company in the State of Iowa and elsewhere, and also all the railroads owned by the said Railway Company or which may be acquired or created within or without the State of Iowa by purchase, construction, consolidation or otherwise, and generally the property of the Railway Company within and without the said State of Iowa, acquired or to be acquired, real, personal or mixed, in possession or in expectancy, including the corporate and other franchises of said Railway Company, and

Whereas, Each of the said bonds or obligations is to be in words and figures following, subject only to the necessary variations as to the numbers thereof, each of said bonds being for the sum of one thousand dollars, to-wit:

UNITED STATES OF AMERICA.

No.....

$1,000.

242 Chicago, St. Paul and Kansas City Railway Company.

First Mortgage, Five Per Cent Gold Bond.

Know All Men By These Presents, That the Chicago, St. Paul and Kansas City Railway Company is indebted to The Metropolitan Trust Company of the City of New York, and Robert H. Benson, of London, England, or bearer, in the sum of one thousand dollars lawful

money of the United States of America, which indebtedness it promises to pay in United States gold coin of the present standard, or at the option of the holder in sterling money at the fixed rate of four shillings one and one-half pence per dollar, to the said Metropolitan Trust Company of the City of New York, and Robert H. Benson, or to the bearer hereof, on the first day of July, A. D. one thousand nine hundred and thirty-six, at the office or agency of said Railway Company in the city of New York, with interest thereon in the meantime in like gold coin or sterling at the rate of five per centum per annum, payable semi-annually on the first day of January and July of each year, at the said office or agency, upon presentation and surrender of the annexed coupons as they severally fall due, and in case of default in the payment of any half-yearly installment of interest which shall have become payable and shall have been demanded by presentation at such office or agency in the city of New York, of the coupons therefor, and the continuance of such default for the period of six months after the maturity of such installment, the principal
243 of this bond shall become due in the manner and with the effect, and subject to the conditions provided in the mortgage or deed of trust securing payment of the same hereinafter mentioned.

This is one of a series of bonds, all of like amount, tenor and effect, numbered consecutively, from one upwards, issued and to be issued for the purpose of constructing and equipping its said railroad, and construction of bridges, and purchasing, leasing, aiding in construction, constructing or consolidating with any other railroad or railroads, branch or otherwise and the franchises and properties thereof within or without the State of Iowa, which the said Chicago, St. Paul and Kansas City Railway Company may now or hereafter have lawful right or power to purchase, own, lease or aid in construction, or consolidate with, and for the purpose of purchasing, paying and extinguishing the bonded debt of any railway, now owned by the said Chicago, St. Paul and Kansas City Railway Company, or which may hereafter be purchased or acquired by said Railway Company.

The payment of each and all of the bonds of said series, together with the interest thereon, without reference to the time when said bonds shall be actually issued, is secured by a mortgage or deed of trust bearing date on the first day of July, A. D. one thousand eight hundred and eighty-six, duly executed by the Chicago, St. Paul and Kansas City Railway Company to the said Metropolitan Trust Company, of the City of New York, and Robert H.
244 Benson, of London, England, Trustees, conveying the railroad of the said Railway Company, constructed and to be constructed in the State of Iowa and elsewhere, and all railroads owned by the said Railway Company, or which may be by it acquired or created, within or without the State of Iowa, by purchase, lease, aiding in construction, constructing, consolidation or otherwise, and generally the equipments, appurtenances, property, revenues and franchises, in said mortgage or deed of trust mentioned, as specifically mentioned and set forth in said mortgage or deed of trust. The amount of said bonds authorized by said mortgage is thereby limited as follows:

First. Twenty thousand dollars per mile for every mile of single track railroad actually constructed and in operation.

Second. An additional amount not exceeding five thousand dollars per mile for providing for actual cost proven to the Trustees of rolling stock and equipment and of right of way, depot grounds and terminal facilities in cities of over eight thousand population.

Third. An additional amount not exceeding eight thousand dollars per mile for each mile of double track actually constructed and in operation (exclusive of side track) and not exceeding actual cost thereof, to be certified to the Trustees.

Fourth. Not over sixteen million dollars of bonds in all shall be issued under said mortgage.

This bond shall pass by delivery or by transfer on the books of the Company in the city of New York or London. After
245 registration no transfer except upon the books of the Company shall be valid unless the last transfer shall have been to bearer, and transferability by delivery thereby restored, but this bond shall be subject to successive registrations and transfers to bearer, or otherwise, as aforesaid, at the option of each holder. This bond shall not become obligatory until it shall have become authenticated by a certificate indorsed thereon, duly signed by the Trustees, to the effect that the same is properly issued.

It is Further Provided, That the Railway Company may at its option, at any time after ten years from date hereof, pay and extinguish the whole issue of bonds secured by said mortgage by giving such notice thereof as is required in said trust deed and paying all the accrued interest on such bonds, if any, together with the face value thereof, with five per centum premium thereon.

In Witness Whereof, The Chicago, St. Paul and Kansas City Railway Company has caused its corporate seal to be hereto affixed, and the same to be attested by the signatures of its President and Secretary, and has caused the coupons hereto annexed to be authenticated by the engraved signature of W. M. Johnston, its Treasurer, at the date of said mortgage on the first day of July, A. D. one thousand eight hundred and eighty-six.

CHICAGO, ST. PAUL AND KANSAS CITY RAILWAY COMPANY,

By ——— ———, *President.*

——— ———, *Secretary.*

246 *Trustees' Certificate.*

This is one of a series of bonds, numbered consecutively from one upward, issued by the Chicago, St. Paul & Kansas City Railway Company, secured by a mortgage of its line of road and other property in said mortgage mentioned, acquired and to be acquired, which has been duly executed, and this bond has been issued in accordance with the provisions of said mortgage.

METROPOLITAN TRUST COMPANY OF THE CITY OF NEW YORK,

By ——— ———, *President.*

——— ———, *Trustees.*

Form of Coupon.

$25.00.

The Chicago, St. Paul & Kansas City Railway Company will pay to the bearer Twenty-five Dollars, at the office or agency of the Company in the city of New York, in gold coin of the United States of the present standard, or at the option of the holder in Sterling money at the fixed rate of four shillings one and one-half pence per dollar, on the —— day of ——, A. D. —, being six months' interest on its first mortgage gold bond No. —.

—— ——, *Treasurer.*

It Is Expressly and Mutually Agreed, That at the option of
247 the said Railway Company the said bonds shall be payable on the first day of July or January of any year after the expiration of ten years from this date by the said Railway Company paying the accrued interest, if any, on such bonds, together with the face value of all the bonds issued as aforesaid, and hereby secured, together with five per centum premium upon such face value; provided, however, that if said Railway Company shall desire so to pay such bonds after the expiration of ten years and before the maturity thereof, it shall, at least three months prior to the day of such payment, give notice to the bondholders of its election and intention to pay the same as aforesaid by publishing such notice for four consecutive weeks in three daily papers of general circulation printed and published in the city of New York, and in three daily papers of general circulation printed and published in London, England, and thereafter said bonds shall cease to bear interest unless upon presentation of any or all of said bonds for payment the Company shall fail to pay the same in accordance with said notice.

All bonds to be issued hereunder shall be issued only by the sanction of the Trustees, or Trustee for the time being of these presents, and under the following conditions, to-wit: The Trustees shall, after the execution, delivery and recording of this mortgage or deed of trust, on demand of the President, duly authorized by resolution of the Board of Directors of the Railway Company, sanction an issuance of bonds to an amount not exceeding Twenty
248 Thousand Dollars per mile of single track railroad actually constructed and in operation, and whenever any additional miles of single track railway within or without the State of Iowa shall be acquired or created by the Railway Company, by purchase, construction, consolidation or otherwise, and such fact shall be made to appear to said Trustees by the affidavits of the President or a Vice President and Chief Engineer of the Railway Company, showing, among other things, the exact length of the railway or railways so acquired or created, said Trustees shall, upon the request of the President, duly authorized by resolution of the Board of Directors of the Railway Company, sanction a further issue of bonds hereunder to an amount, at the rate of, but in no event exceeding the amount of Twenty Thousand Dollars per mile of single track railway so acquired or created. To provide for the rolling stock and equipment, the necessary right of way, depot grounds and terminal facili-

ties in cities with a population exceeding eight thousand, for the said railway, the Trustees shall, upon the request of the President, duly authorized by resolution of the Board of Directors of the Railway Company, and a certificate of the President or Vice President that said rolling stock and equipment, or right of way, depot ground or terminal facilities have been purchased and paid for, and are in actual use by the Railway Company, giving detailed statement of said expenditures, and the actual cost of the same, sanction a further issue of bonds hereunder to an amount equal to the cost of the same, but in no event exceeding the sum of Five Thousand Dollars per mile of railway so owned, acquired or created as aforesaid.

The Trustees are also hereby authorized to sanction a further issue of bonds hereunder to an amount not exceeding eight thousand dollars per mile for each mile of double track (exclusive of side track) actually constructed or acquired and in use by said Company, and not exceeding the actual cost of the additional track for the purpose of paying the cost thereof; provided, that the Trustees shall not sanction the issue of any bonds for the purpose of paying for the double track until the certificate of the President or Vice President of the Railway Company showing the completion of such track, and the actual cost thereof, is filed with said Trustees. It is expressly understood that the Trustees shall not deliver any bonds to the Company under the provisions of this mortgage on account of any road purchased or otherwise acquired, being incumbered by a previous mortgage or deed of trust, until such incumbrance is removed as hereinafter stated. In case the Railway Company has or may hereafter purchase any railway or railways being so incumbered, the Trustees may, and it shall be their duty upon the request of the President duly authorized by resolution of the Board of Directors of the Railway Company, to certify the bonds which the Railway Company would be entitled to issue in respect to such road were the same unincumbered and exchange the same or such portion thereof as said Board of Directors may direct, with such person or persons, corporation or corporations, as said Board may direct, upon receiving all the bonds then outstanding, which are an incumbrance upon such purchased or acquired railway, and it shall be the duty of the Trustees to cause all the bonds so received to be cancelled and a proper satisfaction of the incumbrances on such purchased or acquired road to be entered of record, and deliver the balance (if any) of such bonds so certified on account of road so purchased or acquired, to the Company. But it is further expressly provided that the Railway Company having purchased or leased for a period of not less than ninety-nine years any railway thus incumbered, or having purchased or acquired an interest in the stock of any such other railway company, may make an agreement to exchange the whole or any portion of the bonds it would be entitled to issue hereunder in respect to such railway were it owned by the Railway Company and unincumbered, and exchange the same for the bonds then outstanding, which are an incumbrance upon such property, giving bonds of the railway Company at par for bonds of the incumbered Company at such per cent of the par value thereof as may be agreed upon, provided that the bonds issued by

the Railway Company when the exchange is fully completed shall be sufficient under such agreement to cancel all of the outstanding incumbrances on the road so purchased, leased or otherwise acquired; and thereupon it shall be the duty of said Trustees, upon filing said contract with them, and upon request of the President, duly authorized by resolution of the Board of Directors of the Railway
251 Company, to certify an amount of bonds issued hereunder equal in the aggregate to the amount of bonds which the company would be entitled to have certified in respect to such road were it purchased by the Company and unincumbered. It shall be the duty of the Trustees to exchange such bonds from time to time with the holders of the securities of the acquired railroad or any portion of them, in accordance with the terms of said contract, and the securities thus received by the Trustees shall be held by them uncancelled, in trust for the Railway Company and holders of bonds issued under this mortgage, and as collateral security for all the bonds issued or to be issued under this mortgage or trust deed, collecting the interest and dividends thereupon, as the same shall become due, and paying the same over to the Railway Company, until default in this mortgage, and upon default said income shall be held by the Trustees for the benefit of the bondholders under this mortgage. When all the said securities shall have been exchanged, if said railroad shall have become the property of the Company so that this mortgage may become a first lien thereon, then the Trustees, at the request of the Board of Directors of the Railway Company, shall cause such securities to be cancelled and the mortgage or mortgages securing the same to be satisfied of record and the surplus of said bonds (if any) certified by said Trustees on account of such railroad shall then be delivered to the Company. It is the intention hereof, and the same is hereby declared, that all of the bond
252 so to be issued as hereinbefore provided, shall be equally in all respects secured by these presents upon all the property hereinafter described, without preference, priority or discrimination on account of or with reference to the times of the actual issue of said bonds or any of them.

Now Therefore, In consideration of the premises, and in consideration of the sum of One Dollar, to it duly paid by the said Trustees, the parties of the second part aforesaid, the receipt whereof is hereby acknowledged, and in the execution of the statutory powers in this behalf conferred by the legislature of the State of Iowa:

This Indenture Witnesseth, That the Chicago, St. Paul & Kansas City Railway Company hath granted, bargained, sold and assigned, and by these presents doth hereby grant, bargain, sell, assign, convey and transfer unto the said Metropolitan Trust Company, of the City of New York, and Robert H. Benson, of London, England, and their successors in this trust all and singular, the railroad of the Railway Company or which the Railway Company is authorized by law to construct, as the same shall hereafter be constructed; and also any and all railways or railway property which the Railway Company may now own or hereafter acquire or create in the State of Iowa, and in all other States or Territories, or in either or any of

said States or Territories, by purchase, construction, consolidation, or otherwise; and all interests which the Railway Company shall have or acquire in and to any railway, or railway property in all or any of said States or Territories, by its purchase and owner-
253 ship of the stock or other securities of any railway company; including also all its leasehold interests now existing or hereafter to arise in and to any railway or railway property in any of said States or Territories; including, also, all the railway, right of way, depot grounds, and all lands used in connection with the operation and maintenance of the said railway, now owned by the Railway Company, or hereafter in anywise to be acquired, and all tracks, bridges, viaducts, culverts, fences, and other structures, all depots, station houses, engine houses, car houses, freight houses, wood houses and other buildings, and all machine shops and other shops now held or acquired, or hereafter to be held or acquired by said Company, its successors or assigns, in any of said States or Territories, for use in connection with the said railway, or any part thereof, or of any such railways as it may hereafter acquire in any of said States or Territories as aforesaid; and including, also, all locomotives, tenders, cars and other rolling stock or equipments, and all machinery, tools, implements, fuel, supplies, and material for constructing, maintaining, operating, repairing and replacing the said railway, acquired or to be acquired, or any part thereof, or any of the equipments or appurtenances thereof, or of any part thereof; and including also, all revenues, rates, tolls, sums of money and income arising or to arise from said railway or other the premises hereinbefore expressed to be conveyed, or any of them; and also all corporate and other franchises, rights, privileges and immunities now owned, held and en-
254 joyed by the Railway Company, or hereafter to be owned, held and enjoyed by, or conferred upon, the said Railway Company, in any of said States or Territories, connected with or relating to the said railway, or railways, acquired, to be acquired, constructed or to be constructed, in any of said States or Territories, or to the construction, maintenance or use of the same, and necessary to the full, complete and convenient use, operation and enjoyment of the said above described premises and property, and including, also, all telegraph lines, poles and instruments, telegraph offices and materials, and all the appurtenances, privileges, franchises and immunities therewith connected; it being the intention hereof to include herein, generally, all the property of the Railway Company, real, personal and mixed, in possession and in expectancy, now owned and hereafter to be in anywise acquired in all or any of said States or Territories, together with all and singular the tenements, hereditaments, rights, members, privileges, easements, and appurtenances to the said railway and premises hereinbefore expressed to be conveyed, or any of them, belonging or in anywise appertaining, or at any time held or enjoyed therewith, and the reversion and reversions, remainder and remainders, tools, incomes, revenues, rents, issues and profits thereof; and also all the estate, right, title and interest, property, possession, claim and demand whatsoever, as well at law as in equity, of the Railway Company in and to the same, and

any and every part thereof, with the appurtenances; it being
255 intended and it is hereby agreed, that all railways and railway property, which shall or may be hereafter in anywise acquired by the Railway Company in either or any of said States or Territories, or in any other State or Territory, shall be as fully embraced within the provisions hereof, and subject to the lien hereby created for the payment of any and all of said bonds so to be from time to time issued as aforesaid, as if the said railways and other property were now owned by the Railway Company and were specifically described herein and conveyed hereby.

To Have and to Hold, all and singular, the above mentioned and described railway, acquired and to be acquired, rolling stock, franchises and other property, and all other the premises hereinbefore expressed to be conveyed, with the appurtenances, unto and to the use of said Metropolitan Trust Company, of the City of New York, and Robert H. Benson, of London, England, and their successors in said trust, according to the nature, tenor and quality thereof respectively, upon and for the trusts, intents and purposes hereinafter expressed of and concerning the same; and for the further carrying into effect the conveyance hereinbefore expressed to be made, the Railway Company does hereby appoint the said Trustees, their successors in said trust, and the survivors of them, the attorneys or attorney of the Railway Company, to ask and receive payment and delivery of all and every the sums of money, goods, chattels and effects hereinbefore expressed to be assigned and transferred, and to
give effectual releases and discharges, and for all or for any
256 of the purposes aforesaid, or of this instrument, to appoint an attorney or attorneys, or agent or agents, and from time to time revoke such appointment, and to use the name of the Railway Company, and generally to act in relation to the premises as it or they shall think fit.

And it is hereby agreed and declared, that the said Trustees and their successors for the time being in said trust, respectively, shall stand possessed of and interested in all and singular the premises hereinbefore expressed to be conveyed upon and for the trusts, intents and purposes, and subject to the powers and conditions following, that is to say:

Article First. Until the Railway Company, or its successors, shall make default in the payment of some principal money or interest of the said bonds, or some or one of them, according to the tenor thereof, or of the coupons thereto annexed, at the time or in the manner appointed for the payment thereof, or shall make default or breach in the performance or observance of any other condition, obligation or requirement by the said bonds or by the present deed imposed on the Railway Company or its successors in reference to the said bonds, the said Trustees and the survivor of them, and every other Trustee, from time to time, of these presents, shall permit and suffer the Railway Company and its successors, to possess, manage, operate and enjoy the said railway, with its equipments and appurtenances, and other the lands, premises, property and franchises hereinbefore de-

scribed as conveyed hereby, and to receive, take and use the
257 tolls, incomes, revenues, rents, issues and profits thereof, in the same manner and with the same effect as if this deed had not been made.

Article Second. If, and whenever the Railway Company, or its successors, shall make any default in payment, as mentioned in the last preceding article, upon any of the said bonds or the coupons belonging thereto, and such default shall continue for the period of six months, or if and whenever the Railway Company or its successors shall make default or breach in the performance or observance of any such other condition, obligation or requirement as mentioned in the last preceding article, and such last mentioned default shall continue for the period of six months, then and in either of such cases it shall be lawful for the said Trustees to enter into and upon and to take and possess all and singular the railway and all the premises hereinbefore expressed to be conveyed, or any of them, or any part or parts thereof, respectively; and to have, hold and use the same, and to work and operate, by their superintendents, managers, receivers or servants, or other attorneys or agents, the said railway; and to conduct the business thereof, and to make from time to time such repairs and replacements and such useful alterations, additions and improvements thereto as may seem to them to be judicious or convenient; and to collect or receive all tolls, freights, incomes, revenues, rents, issues and profits of the said railway and premises, and of every part or parcel thereof, and after
deducting and defraying the expenses of working and operat-
258 ing the said railway and conducting the business thereof, and of all the said repairs, replacements, alterations, additions and improvements, and all payments which may be made for charges or liens of any kind, prior to the lien of these presents, and other expenses and outgoings whatsoever incurred in relation thereto, as well as just compensation for their own services and for the services of such attorneys and counsel, and all other agents and persons as may have been by them employed, the said Trustees shall apply the moneys arising from such collection and receipt as aforesaid, in or toward the payment of interest on the said bonds in the order in which the said interest shall have become due, ratably to the persons holding the coupons evidencing the right to such interest; and after paying all interest coupons which shall have become due, shall apply the residue of the said moneys in or towards the payment of the principal of such of the said bonds as may be at that time outstanding and unpaid, ratably and without discrimination as to persons; and if after satisfaction thereof, a surplus shall remain, they shall pay over such surplus to the Railway Company, its successors or assigns, or as any court of competent jurisdiction shall order. Provided, nevertheless, that if the said Trustees shall think it inexpedient, after such entry as aforesaid, to work and operate said railway and premises in manner aforesaid, it shall be lawful for them to demise and let the said railway and premises (subject, however, to the provisions hereof), to any person or persons, corporation or cor-

porations willing to work and operate the same, for such
259 term or period, at such rent or proportion of receipts and profits, and generally upon such terms and conditions as the said Trustees shall, in their discretion, think fit; and the said Trustees shall apply the revenue or income to arise from such demise or letting in the same manner as the net revenue or income to arise in the event of the said railway and premises being worked and operated by the said Trustees is applicable under the provisions immediately hereinbefore contained.

Article Third. In case any such default shall be made as aforesaid, in the payment of the principal or interest of said bonds, and shall continue as aforesaid, it shall likewise be lawful for the said Trustees, either after such entry as aforesaid, or other entry, or without entry, by their attorneys or agents, to sell and dispose of all and singular the premises and property hereby conveyed, or any part thereof, at public auction in the city of New York and State of New York, or in the city of Dubuque and State of Iowa, in the discretion of said Trustees, at such time as they may appoint, first giving notice of said sale, and of the time, place and terms thereof, by advertisement for the term of four weeks in some daily newspaper published in said city of New York, and also in some daily or weekly newspaper published in the city of London, England, and in some daily or weekly newspaper published in the city of Dubuque in the State of Iowa. The sale of said property shall be for cash, either wholly payable in hand or one-third in hand and the balance in two annual installments, with interest, as the Trustees may deem advis-
260 able. The proceeds of sale shall be applied first in payment of the expenses connected with said sale and trust, including the compensation of the Trustees, and all charges incurred by them as such Trustees, and secondly, in payment of the unpaid interest and principal of the said several bonds, ratably and without discrimination as to persons; and if, after paying in full said bonds and coupons, there shall be any money remaining in the hands of *of* said Trustees, they shall pay the same to the Railway Company, its successors or assigns. The said trustees shall have power to adjourn said sale from time to time at their discretion; and if adjourned to another date they may make said sale at the time appointed without further notice by advertisement; and said Trustees shall have power to make and deliver to the purchaser or purchasers at said sale, good and sufficient deeds of conveyance of the property sold. And it is further declared and agreed that the receipt of said Trustees shall be a sufficient discharge to the purchaser or purchasers of the premises which shall be sold as aforesaid, for his or their purchase money; and such purchasers shall not, after the payment of such purchase money, be liable to see to its application upon or to the purposes or trusts of these presents, or to be in any manner answerable for any loss, misapplication or non-application of such purchase money, or any part thereof, or to be obliged to inquire into the necessity or expediency of or for any such sale. Provided, however, that no sale shall be made by said Trustees as aforesaid, except upon de-
261 mand of the holders of not less than one-fifth of the said bonds then outstanding, and even in the event of such de-

mand, no sale shall take place if the holders of the majority of said bonds shall by themselves, or by their attorneys in fact, file with said Trustees a written instrument objecting to such sale.

Article Fourth. In case the Railway Company, or its successors, shall make default in payment of any interest on any of the said bonds according to the tenor thereof, or of the coupons thereto annexed (the payment of interest having been demanded by presentation at the Company's office or agency in the city of New York or London, at the option of the holder, of the coupons therefor), and such default shall continue for the period of six months after such demand, then and thereupon the principal of all of said bonds shall, at the election of said Trustees, to be signified to the Railway Company, or its successors, by the said Trustees in writing, become immediately due and payable: provided, nevertheless, that at any time after such default shall have been so made and have continued as aforesaid, and before the actual payment of the principal, it shall be lawful for a majority in interest of the holders of the said bonds for the time being to direct the Trustees either forthwith to exercise their said power of declaring the principal of said bonds due and payable, or to waive the exercise of said power (if unexercised) or to withdraw and annul the exercise thereof (if exercised), either absolutely or with the consent of the Railway Company, or its
262 successors, and to direct the said Trustees to dismiss any suit brought against said Company upon any bond secured by this mortgage, and release and discharge any judgment or decree obtained thereon, on such terms as may be directed by the said majority, by the same instrument: provided, nevertheless, that no action taken by the said trustees, or by the bondholders under this Article, shall prejudice or affect the powers or rights of the said Trustees, or of the bondholders, in the event of any subsequent default.

Article Fifth. It is hereby declared and agreed that it shall be the duty of the said Trustees to exercise the power of entry hereby granted, or the power of sale hereby granted, or both, or to proceed by suit or suits, in equity or at law, to enforce the rights of the bondholders in the several cases of default on the part of the Railway Company, or its successors, herein specified, in the manner and subject to the qualifications herein expressed, upon the requisition of bondholders as herein prescribed, as follows:

First. If the Railway Company, or its successors, shall make any default in the payment of some principal money or interest of said bonds, or some or one of them, according to the tenor thereof, or of the coupons thereto annexed, then and in such case, upon a requisition in writing, signed by the holder or holders of said bonds, to an aggregate amount of not less than one-fifth thereof, and a proper indemnification by such holder or holders of the said Trustees
263 against the costs and expenses to be by them incurred, it shall be the duty of the Trustees to enforce the rights of the bondholders under these Presents by entry, sale, or suit or suits, in equity or at law, as they, being advised by counsel learned in the law, shall deem most expedient for the interest of the holders of said bonds.

Provided, nevertheless, that it shall be lawful for a majority in interest of the holders of said bonds for the time being, by an instrument under their hands and seals, to direct the said Trustees to waive such default upon such terms as may be directed by the said majority in said instrument. And it is hereby provided that no action taken by the Trustees, or by the bondholders under this clause, shall prejudice or in any manner affect the powers or rights of the said Trustees or of the bondholders, in the event of any subsequent default. And it is hereby further provided and expressly agreed that no action shall be commenced or prosecuted against said Company upon any of the coupons annexed to said bonds, or otherwise, at law or otherwise, except by the Trustees, as in this Article provided.

Second. If the Railway Company, or its successors, shall make default or breach in the performance or observance of any other condition, obligation or requirement by the said bonds or by this present deed imposed on the Railway Company, or its successors, then and in such case the Trustees shall, upon a requisition in manner aforesaid of not less than one-fifth in interest of the bondholders for the time being, and upon a proper indemnification by such applying bondholders of said Trustees against the costs and
264 expenses to be by them incurred, enforce the rights of the bondholders under these Presents in the manner by the first clause of this Article provided, subject to a power in such majority at any time to direct in manner aforesaid the said Trustees to waive such default or breach, upon reparation therefor to the satisfaction of such majority being made. And it is hereby provided that no action taken by the said Trustees, or by the bondholders under this clause, shall prejudice or in any manner affect the powers or rights of the said Trustees, or of the bondholders in the event of any subsequent default or breach.

Article Sixth. The action of the Trustees herein, in regard to enforcing to any extent the lien created by this mortgage, either by taking possession or by sale at auction, or by lease, or by resort to judicial proceedings, or by any means authorized or contemplated hereby, shall be at all times subject to the control of a majority in amount of the holders of said bonds, their wishes being expressed in writing to said Trustees, but this mortgage shall not be foreclosed, nor shall the property herein mortgaged, nor any of the same, be sold except upon a default in the payment of the principal or interest upon the said bonds, which shall have continued for more than six months, and then only upon the application as above provided of bondholders holding said bonds to the amount of not less than one-fifth of the same then outstanding, which action on the part of said bondholders shall be at all times subject to the control of the majority in amount of the holders of said bonds as herein
265 provided. And it is hereby further expressly agreed that in the event of default by the Railway Company in the payment of principal or interest of said bonds, or otherwise, a majority in interest of the bondholders for the time being shall have the right to agree upon a plan or scheme of reorganization, which plan or

scheme when agreed upon in writing, and signified to the Trustees, shall govern their action thereafter, and shall be in all respects binding and obligatory upon all of the holders of said bonds.

Article Seventh. It being, as hereinbefore recited, in part the object and intention of these Presents to provide by means of the bonds to be issued hereunder, for the purchase or retirement by way of exchange or otherwise of the bonds or other securities of any railway or railways within or without said State of Iowa, which the Railway Company has heretofore, or may now or hereafter lawfully purchase, own or consolidate with, it is expressly understood, covenanted and agreed, in order to effectuate such object and purpose and pending the attainment thereof, that all bonds secured by mortgage upon any railway or railways within or without the State of Iowa, which railway or railways are now or shall be hereafter acquired by the Railway Company by purchase, consolidation, or otherwise, outstanding at the date of such acquirement, which shall be retired or replaced by exchange, or otherwise, by the bonds provided to be issued hereunder and secured hereby, shall be delivered to the Trustees, to be by them held uncancelled until all the bonds
266 of each class or series shall have been retired or replaced as aforesaid, and said bonds so delivered to said Trustees to be held uncancelled as aforesaid, shall be held by said Trustees until cancelled as hereinafter provided, as further security to the holders of the bonds issued hereunder in exchange for the same and as collateral thereto, and also for the benefit and the protection of the Railway Company. And the several mortgages or trust deeds given to secure the payment of the bonds which shall be so delivered to said Trustees, to be by them held uncancelled as aforesaid, shall remain in full force and effect in all respects until the bonds to secure the payment of which each said mortgage or deed of trust was originally executed, shall have been fully cancelled as hereinafter provided, and each such mortgage or deed of trust, and the bonds secured thereby, and delivered to said Trustees, as aforesaid, shall retain its and all of its priorities, rights, benefits, privileges and legal incidents as fully as if this instrument had not been executed, and the said Trustees shall, as the holders of such uncancelled bonds, enforce the said several mortgages or trust deeds executed to secure the payment of the same respectively, whenever and in such manner as shall be necessary and proper in order to protect the parties interested therein, as aforesaid, and the Railway Company, from the holders of similar bonds who shall not have substituted therefor the bonds hereby provided for, if any such holders there shall be, and for that purpose the said Trustees are hereby appointed the agents of the Railway Company, and of all the parties in-
267 terested, as aforesaid, in said bonds so to be held uncancelled, with full and adequate powers in the premises.

But whenever all of the bonds of any class or series, secured by any of said mortgages or deeds of trust, shall have been delivered to said Trustees, it shall be the duty of the Trustees to cancel or procure the cancellation of the same, unless the Railway Company shall request to have them kept alive for the purpose of perfecting its title

to any of the property upon which the same were secured, in which event it is agreed that the same may be used by the Railway Company for the purpose of perfecting, through foreclosure or otherwise, its said title; provided, however, that the lien hereof is in no event to be displaced or in any manner affected by any such proceeding, but any and all title which the Railway Company may acquire through or by means of any proceeding upon any such mortgage or deed of trust shall be subject and subordinate to the lien of these presents, and the Railway Company hereby covenants and agrees that any title it may so acquire shall be by it conveyed at once to the said Trustees by a proper deed of further assurance.

Article Eighth. The said Trustees shall have full power and discretion, upon the written request of the Railway Company, to convey, by way of release or otherwise, to the person or persons, corporation or corporations, designated by the Railway Company, any lands acquired or held for the purposes of stations, depots, shops, or other buildings, and shall also have power to convey as aforesaid,
on like request, any lands or property which in the judg-
268 ment of the Trustees, shall not be necessary for use in connection with the said railway, or which may have been held for the supply of fuel, gravel, or other material; and also to convey as aforesaid, on like request, any lands not occupied by the tract, which may become disused by reason of a change of the location of any station house, depot, shop, or other building connected with the said railway, and such lands occupied by the track or tracks thereof, and adjacent to such station house, depot, shop or other building, as the Railway Company may deem it expedient to disuse or abandon by reason of such change; and to consent to any such change, and to such other changes in the location of the track or depots, bridges, or other buildings or structures, as in its judgment shall have become expedient, and to make and deliver the conveyances necessary to carry the same into effect; and the Trustees shall also have full power to allow the Railway Company from time to time to dispose of, according to its discretion, such portions of the equipment, machinery and implements, at any time held or acquired for the use of the Railway Company, as may have become unfit for such use, replacing the same by new, and all the property acquired for replacing any of the property conveyed under the provisions of this Article shall immediately be and become, without any other act or conveyance upon the part of the Railway Company, subject to the operation and lien of these Presents.

Article Ninth. The party of the first part doth hereby cove-
269 nant, promise and agree to and with the parties of the second part, and their successors, that the party of the first part will well and truly pay the said bonds which these presents are executed to secure, and the interest due and to grow due thereon, according to the tenor thereof; and also that the party of the first part will not at any time, or in any manner, take, apply for or avail itself of any injunction or stay of proceedings, or plead, use, interpose or take advantage of any extension law, stay law, valuation law, redemption law, or any other law of the State of Iowa or any other State or Ter-

ritory in which it may own property covered by this mortgage, now in force or which may hereafter be in force in either of the said States or Territories, and which may in any way alter, affect, impair or impede the rights or remedies of the holders of said bonds, or of the said parties of the second part, or of their successors as herein declared, or which shall affect or change the time, place, means or mode of perfecting, enjoying or enforcing any of such rights, interests or remedies, as the same are herein declared and set forth.

Article Tenth. Subject to the security hereby created for the due payment of the said bonds, and the principal moneys and interest thereon, and for the performance and observance of the conditions, obligations and requirements thereby, or by the present deed, imposed on the Railway Company and its successors, said Trustees shall stand possessed of all and singular the premises hereinbefore expressed to be conveyed, and the property and effects for the time being representing the same, in trust for the Railway Com-
270 pany, its successors and assigns, and upon and immediately after the due completion of every such payment, and the due performance and observance of every such condition, obligation and requirement, said Trustees shall reconvey all and singular the said premises, property and effects to the Railway Company, its successors and assigns, or as they shall direct.

Article Eleventh. It is mutually agreed by and between the parties hereto, that the expressions "the said Trustees," and "the Trustees," as used in these Presents, shall be construed to mean the Trustee or Trustees for the time being, and it is mutually agreed by and between the parties hereto, that every Trustee of these presents shall be entitled to the ordinary indemnity and right to reimbursement given to Trustees; and shall not be answerable for any error or mistake made by it or him in good faith, but only for gross negligence or wilful default in the discharge of its or his duties as Trustee, and also, that every such Trustee shall be entitled to just compensation for all services which he or it may hereafter render in this trust, to be paid by the Railway Company, or its successors, out of the income of the trust property; and for that purpose he or it may at any time apply to any court of competent jurisdiction, without notice, except to the Railway Company or its successors; and in the event of the death, resignation, declination or inability to act of the said Trustees or any Trustee of these presents, it shall be the duty of the Railway Company to give notice to the bondholders, by
271 advertisement, for four successive weeks, in some daily newspaper published in the city of New York, and in some daily newspaper published in the city of London, England, of a time and place of meeting for the election of a Trustee or Trustees, at which meeting a majority in interest of the bonds there represented may, with the concurrence of the Railway Company in the choice of said majority, elect or appoint a Trustee; and in the event that the Railway Company and said majority cannot agree upon a Trustee, then upon application of any bondholder under these Presents, and notice to the Railway Company, or upon application of the Rail-

way Company, a Trustee may be appointed by a judge of the Circuit Court of the United States for any district of Iowa. Upon the election or appointment of any such Trustee at any meeting as aforesaid, a statement or certificate of such election or appointment shall be made showing the amount of said bonds represented at said meeting, and the amount thereof voting for the Trustee so elected or appointed; which statement or certificate shall be signed by the president or chairman and secretary of said meeting, and by the proper officers of the Railway Company, and said statement or certificate shall have attached thereto a copy of said printed notice, with proof of the publication thereof. If an appointment of Trustee shall be made by a judge of said Circuit Court, as hereinbefore provided, the party applying for such appointment shall procure the appointment to be signed by said judge making the same
272 attested by the clerk of said court, and shall have attached thereto a copy of the application for such appointment. And the said statement or certificate of election or appointment at said meeting, and the appointment of the Trustee, signed by such judge as aforesaid, shall be filed with the Secretary of the State of Iowa, and the person or persons or corporation named in such statement or certificate, or in such judge's appointment, shall thereupon be and become the Trustee for the time being of these Presents, as fully to all intents and purposes as if this present deed had in the first place been executed and delivered to such person or persons or corporation. Provided, That if by death, resignation or otherwise a vacancy shall occur as to either of the Trustees herein designated, the surviving or remaining Trustee shall, until said vacancy shall have been filled as herein provided, execute all the powers under this instrument conferred upon said Trustees herein, as fully to all intents and purposes as though he or it had originally been appointed herein as sole Trustee.

And the said party of the first part, for itself and its successors, in consideration of the premises and of one dollar to it paid by the parties of the second part, the receipt whereof is duly acknowledged, hereby further covenants and agrees to and with the said parties of the second part, and their successors, that the said party of the first part, and its successors, shall and will from time to time, and at all times hereafter, and as often as thereunto requested by the Trustees, execute, acknowledge and deliver all such further deeds of
273 conveyance and assurances in the law for the better assuring unto said trustees the said Railway, equipments, appurtenances and all other property and things whatsoever hereinbefore mentioned as by this instrument to be conveyed, and all franchises of every nature pertaining thereto, now held or hereafter to be acquired by the Railway Company, as by the said Trustees, or by their counsel learned in the law, shall be reasonably advised, devised or required; and the said party of the first part, for itself and its successors, in consideration of the premises, and of one dollar to it duly paid by the said party of the second part, the receipt whereof is duly acknowledged, further covenants and agrees to and with the said parties of the second part, and their successors, that it, the said party of the first part, and its successors, shall and will at

all times hereafter keep open an office or agency in the cities of New York and London, England, for the payment of the principal and interest of and upon the bonds herein before recited and described, as the same shall become payable, and for the transfer and registration of the said bonds, and that any and every default in the due performance of this covenant shall be deemed and taken to be a waiver of presentment and a demand of payment of all and every of the bonds and coupons aforesaid which may become payable during the continuance of said default.

In Witness Whereof, The said party of the first part, the Chicago, St. Paul and Kansas City Railway Company, has caused
274 these presents to be signed by its President, sealed with its corporate seal and countersigned by its Secretary, and to testify their acceptance of said trust the said Metropolitan Trust Company, of the City of New York, has likewise caused the same to be signed by its President and Secretary, and sealed with its corporate seal, and the said Robert H. Benson has hereto set his hand and seal.

CHICAGO, ST. PAUL AND KANSAS —
RAILWAY COMPANY,
By R. T. WILSON, *President*,
W. C. WOODRUFF, *Secretary*.

[Corporate Seal Chicago, St. Paul and Kansas City Railway Company.]

Signed, sealed and delivered by R. T. Wilson, President, in presence of:

WILLIAM H. CLARKSON,
C. H. BOSHER.

Signed, sealed and delivered by W. C. Woodruff, Secretary, in presence of:

ROBT. C. WIGHT,
W. S. C. KNOWLTON.

METROPOLITAN TRUST CO. OF THE
THE CITY OF NEW YORK,
By THOS. HILLHOUSE, *President*,
WALTER J. BRITTIN, *Secretary*,
R. H. BENSON, [SEAL.]
Trustees.

[Seal Metropolitan Trust Company of the City of New York.]

275 Signed, sealed and delivered by Thomas Hillhouse, President, and Walter J. Brittin, Secretary of the Metropolitan Trust Company of the City of New York in presence of:

JOHN C. TELFORD,
CHARLES M. JESUP.

Signed, sealed and delivered by Robert H. Benson, in presence of:

F. H. NEIGOD, *Chief Clerk*,
H. H. NEWMAN, *Clerk*,
Consulate General, London.

(Duly acknowledged.)

OFFICE OF RECORDER OF DEEDS.
County of Union, Iowa:

I hereby certify that the within instrument was filed in this office for record on the 8th day of May, 1888, at 4:15 o'clock P. M. and was duly recorded in Book 60 of Mortgages, pages 284 and consecutively.

C. E. HEWART,
Recorder of Deeds.

276 DEFENDANT'S EXHIBIT 13.

Chicago, St. Paul & Kansas City Railway Company.

General Mortgage.

This Indenture, Made this first day of January, A. D. 1889, between the Chicago, St. Paul & Kansas City Railway Company, a corporation duly incorporated under the general laws of the State of Iowa, party of the first part, and the Metropolitan Trust Company, of the City of New York, a corporation under the laws of the State of New York, and Robert H. Benson, of London, England, parties of the second part.

Witnesseth: Whereas, The Railway Company is now the owner of eight hundred and eleven and 60/100 miles of completed railway and other property, hereinafter described and hereby conveyed, which is now encumbered by three sectional mortgages, two issued by the Minnesota & Northwestern Railroad Company, bearing the date respectively on the first day of July, A. D. 1884, and the first day of December, A. D. 1887, and one issued by the party of the first part, bearing date on the first day of July, A. D. 1886, the maximum amount of indebtedness issuable under all of said mortgages being limited to twenty-five thousand dollars per mile of railroad, including rolling stock and terminals, at any time owned by the Company; and

277 Whereas, For the purpose of paying off and retiring all the bonds of said prior issues, adding to and improving its property and generally strengthening its resources, the Railway Company has duly resolved to issue, from time to time, as its Board of Directors may determine, its bonds bearing date the first day of January, A. D. 1889, payable at the office of the Railway Company in the City of New York, on the first day of January, A. D. 1989, to be known as "General Mortgage Gold Bonds," said bonds to be issued in any denominations of Dollars, Sterling, Dutch Guilders, Francs or Marks, from time to time fixed by the Board of Directors; principal and interest, or either, payable in gold coin, or, at the option of the holder, in Sterling; or payable in Dollars, Sterling, Dutch Guilders, Francs or Marks, in the discretion of the Board of Directors, and at such rate of exchange as they may fix, and issuable, part or all, payable to bearer, with coupons attached, or part or all as registered bonds without coupons, and bearing such interest (not

exceeding four per cent per annum) as the Board of Directors may, at or before the issuance thereof, determine from time to time, payable annually, semi-annually or quarterly, in the cities of New York, London, Amsterdam, Paris or Berlin.

Now, Therefore, For the purpose of securing the bonds described and in consideration of one dollar to it in hand paid by the Trustees, the Chicago, St. Paul & Kansas City Railway Company hereby bargains, sells and conveys unto the Metropolitan Trust
278 Company of the City of New York and Robert H. Benson of London, England, as Trustees, and their successors in this Trust, and the survivor of them, all the following described property, to-wit: All its railway as it now exists, and all its leasehold rights in and upon other railways, which together constitute the present lines of the Railway Company, extending from Chicago, Illinois, to Minneapolis, Minnesota, by way of Dubuque, Iowa, with a branch from Hayfield, Minnesota, on said line to Manley Junction, Iowa, and a branch from Sumner, Iowa, on said first line, to Hampton, Iowa, also a line from Oelwein, Iowa, on the first described line, to St. Joseph, Missouri, by way of Des Moines, Iowa, with two branches to Cedar Falls, Iowa, and Coal Mines on the Skunk River in Jasper County, Iowa, being eight hundred and eleven and 60/100 miles owned by the Company, and thirtyseven and 60/100 miles leased; also any extension of said last described line hereafter constructed or acquired from St. Joseph, Missouri, to or toward Kansas City, Missouri, together with all the terminal properties and real estate owned by the Company upon its said lines of railway and in the city of Kansas City, Kansas and Missouri, and all leasehold rights on other railways between St. Joseph and Kansas City, Missouri; also all rolling stock and equipment and all the other property now owned by the Company and used as part of or in connection with its present railway; together with all real estate, additions, improvements, structures and tracks hereafter constructed or ac-
279 quired by the Railway Company upon its present lines and between or at St. Joseph and Kansas City, Missouri; including also all such rolling stock and equipment hereafter acquired by the Railway Company as shall be conveyed to the Trustees as additional security under this mortgage. Any extensions or branches hereafter constructed or acquired by the Railway Company are not covered hereby except as above stated.

To have and to hold the aforesaid property, with the appurtenances thereto belonging, unto the said parties of the second part and their successors in this Trust, and the survivor of them, for the purpose of securing all the bonds to be issued hereunder, which shall be equally secured hereby without preference, irrespective of the dates of their actual issue.

It shall be the duty of the Trustees from time to time, as requested by resolution of the Board of Directors of the Railway Company, to certify and deliver to the Railway Company Ten Million Dollars of said bonds, and, in addition to said Ten Million Dollars, whenever the Company shall deliver to the Trustees any of the bonds of any of the prior issues above preferred to now outstanding or hereafter issued, the Trustees shall certify and deliver to the Railway Company an equivalent amount of bonds of this issue; the bonds of

prior issues so delivered to the Trustees shall be held by them uncancelled as collateral and additional security for all the bonds of this issue, until all the bonds of said prior issues have come into the possession of the Trustees; provided, that when all the bonds
280 of any one of said prior issues shall so come into the possession of the Trustees the same may be cancelled and the mortgage securing them satisfied. It is expressly understood that, notwithstanding the execution of this mortgage, and anything herein contained, the Railway Company may hereafter issue bonds under and in pursuance of its said first mortgage hereinbefore referred to, bearing date the first day of July, A. D. 1886. For the guidance of the Trustees in certifying bonds under these presents, one dollar shall be considered the equivalent of forty-nine and one-half pence Sterling, two and one-half Dutch guilders, five and one-fifth francs and four and one-fifth marks. All bonds issued hereunder shall bear the certificate of the Trustees, to the effect that they are issued under and secured hereby, and all bonds issued by the Railway Company and so certified shall be so secured, and such certificate shall be conclusive evidence that they are so secured. All such bonds payable to bearer, at discretion of the Board of Directors, upon the request of the holder, may be converted into registered bonds, and registered bonds may in like manner be converted into bearer bonds, the bonds taken up in each case to be cancelled by the Trustees before certifying the new bonds issued in lieu thereof.

In case the Railway Company shall fail to pay any part of the interest on said bonds, and such default continues for six months, the Trustees may, and they shall on written request of a majority in amount of bondholders, declare the whole sum, principal
281 and interest, due at once; provided, that a majority in amount of bondholders may, by written instrument, signed by them or their lawful attorneys, control the option of the Trustees hereunder, before it is exercised, or if exercised, revoke or change it.

In case the Railway Company fails to pay any part of the principal or interest when due, and such default continues for six months, the Trustees may, and on written request of a majority in amount of bondholders shall, take possession of and operate the mortgaged property, or sell the same at public auction in accordance with the statutes in such cases made and provided, or foreclose this mortgage by suit in any court of competent jurisdiction; provided, that a majority in amount of bondholders shall have the power by written instrument, signed by them or their lawful attorneys, to control the course of the Trustees in such case, to waive any default, revoke any action taken by the Trustees and discontinue any foreclosure proceedings, if such shall have been commenced. But no action taken under this paragraph, or the last preceding paragraph, with respect to one default, shall prejudice the rights of the Trustees or bondholders upon any subsequent default.

Before default, the Railway Company shall have the right to manage the property and collect and use the income thereof. After all bonds secured hereby are paid the property shall belong and revert to the Railway Company, and in case of foreclosure or operation by

the Trustees of the property, any surplus, after paying costs
282 and expenses, repairs and renewals, and the bonds hereby secured, shall be paid over and belong to the Railway Company. It is agreed that the Trustees may, in the execution of the Trust, act by attorneys or agents, and shall be entitled to reasonable compensation for their services; they shall be accountable for reasonable diligence and care only, and shall not be liable for the acts of any agents appointed by them with reasonable discretion.

The Railway Company covenants that it will, until all the bonds to be issued hereunder are paid, maintain an office or agency in the City of New York for the payment of said bonds and coupons and for the registration of bonds. That it will from time to time execute any other and further reasonable or necessary conveyances for the better assuring to the Trustees the property hereby mortgaged.

The expression "the Railway Company," as used herein, shall be construed to mean the party of the first part, and the expression "the Trustees" and "the said Trustees" shall be construed to mean the Trustee or Trustees for the time being of this mortgage. Every provision hereof referring to the party of the first part shall be construed to refer to and include the several successors and assigns of the said party, as fully as if they were in each provision mentioned.

In witness whereof, the Chicago, St. Paul & Kansas City Railway Company has executed these presents by its President and caused its corporate seal to be hereto affixed, attested by its
283 Secretary, the day and year above written.

CHICAGO, ST. PAUL & KANSAS CITY RAILWAY COMPANY,

By —— ——, *President.*

In presence of

—— ——.

—— ——.

Attest:

—— ——, *Secretary.*

The Metropolitan Trust Company of the City of New York, to signify its acceptance of this trust, has executed these presents by its President and caused its corporate seal to be hereto affixed, attested by its Secretary; and said Robert H. Benson, likewise to signify his acceptance of this trust, has hereto set his hand and seal the day and year above written.

THE METROPOLITAN TRUST COMPANY OF THE CITY OF NEW YORK.

By —— ——, *President.*

Executed by the Metropolitan Trust Company in presence of

—— ——.

—— ——.

Attest:

—— ——, *Secretary.* [SEAL.]

(Duly acknowledged.)

284 DEFENDANT'S EXHIBIT 14.

Articles of Agreement, Made this 2nd day of July, 1887, between the Minnesota & Northwestern Railroad Company, a corporation organized under the laws of the State of Minnesota, party of the first part, and the Chicago, St. Paul & Kansas City Railway Company, a corporation organized under the laws of the State of Iowa, party of the second part, witnesseth:

Whereas, The party of the first part is the owner of and is operating a line of railroad extending from the city of St. Paul, in the State of Minnesota, in a southerly and southeasterly direction to the City of Dubuque, which line it is now constructing and extending from the City of Dubuque to the City of Chicago, in the State of Illinois, so as to form one continuous line of road from said city of St. Paul to the said city of Chicago.

And Whereas, The said party of the second part is the owner of and is operating a line of railroad extending from a junction with the said railroad of the first party at the station of Oelwein, in Fayette County, State of Iowa, in a southwesterly direction to the city of Des Moines, in said state, with a branch to the City of Cedar Falls, and a certain other branch to coal mines upon the Skunk river, which line it is now extending southwesterly from the said city of Des Moines to the cities of St. Joe and Kansas City. Which railroad when constructed will form a continuous line with the said railroad of the Minnesota & Northwestern Railroad Com-
285 pany between said City of St. Paul and St. Joe and Kansas City, and between the said City of Chicago and St. Joe and Kansas City.

And Whereas, Said lines of railway of the parties hereto can be operated most economically and most advantageously both for the interests of the said railroad companies and the public under one control and management.

Now, Therefore, In consideration of the premises and the several agreements hereinafter contained and the sum of one dollar by each party to the other in hand paid, the receipt whereof is hereby acknowledged, this agreement witnesseth:

That the said railroad of the party of the second part from said Oelwein to Des Moines, together with its branches, and all additions and extensions hereafter constructed, and all property appertaining thereto, shall be run, managed and operated by the said Minnesota & Northwestern Railroad Company through its officers, servants and employés. The said Minnesota & Northwestern Railroad Company shall direct the movement of all trains, make all rules, time-cards and regulations, and employ and pay all officers, servants and employés which shall be necessary and proper in said management and operation. The said Minnesota & Northwestern Railroad Company shall generally and in all matters pertaining to the operation of said second party's roads have full power and authority. It shall make all contracts for the carriage of freight and passengers, and
286 transact any and all business properly appertaining to said management and operation.

The said Minnesota & Northwestern Railroad Company shall receive all incomes, tolls, tariffs and earnings of said second party's railroad and property, and shall apply the same as follows:

It shall have the right and authority, and it shall be its duty to pay out of said earnings all the salary or wages of officers, servants and employés solely in the operations and management of the said second party's railroads, and shall pay out of the said earnings the whole of any and all expenses of every kind whatsoever which pertain wholly to the management and operation of said second party's railroads. It shall pay out of such earnings such a proportion of the wages of all officers, servants and employés employed partly in the operation and management of its own railroads and partly in the operation and management of said second party's railroads as the mileage of said second party's railroads operated hereunder bears to the mileage of all the railroads of both of the parties hereto managed and operated by and through such officers, servants and employés. It shall pay out of said earnings a similar proportion of all other expenses of every kind whatsoever incident to the operation and management of both the second party's and the first party's railroads. It shall pay out of said earnings all taxes and assessments levied upon or against the railroads or property of the party of the second part operated hereunder. The net surplus of said
287 earnings shall be paid monthly to the treasurer of the said party of the second part. The Minnesota & Northwestern Railroad Company agrees to keep an accurate account of the earnings and expenses of the railroad and property of the second party managed and operated by it under this contract, and monthly on the 20th day of each month it agrees to render to the auditor of the second party statements in detail showing the earnings of the second party's property and all disbursements and expenses properly chargeable against such earnings under this contract.

It is further agreed that in the management and operation of said second party's railroads and property the said Minnesota & Northwestern Railroad Company, its officers, servants and employés shall act as the representatives and agents of the party of the second part. And the party of the second part hereby assumes all risk and liability for loss or damage to its property, as well as to the persons or property of others, caused by or occurring in the operation and management of the second party's said railroads and other property. The intention hereof is that with respect to all such loss or damage the said second party shall stand liable in all respects, precisely as it would stand were said railroads and property operated directly by said second party and its employés.

The party of the second part agrees to indemnify and save harmless the first party and its officers, servants and employés from all liability or loss by reason of any such damage or injury. And
288 further agrees to defend at its own cost and expense any suits or actions brought with respect to such damage or injury, and to pay all counsel fees and other expenses incident to such suits or actions, and to pay any amounts or sums of money which shall be recovered in such suits or actions, or which shall be ex-

pended in the settlement of claims for such loss or damage, and to repay to the said Minnesota & Northwestern Railroad Company all amounts or sums of money which it may be compelled to pay with respect to such loss or damage.

This contract shall continue in force from the date hereof until the expiration of sixty days' notice given by either party hereto to the other party of the termination of this contract.

In Witness Whereof, The parties hereto by authority of their respective Board of Directors have caused this contract to be signed by their several presidents and secretaries, and the corporate seal of each company to be hereto affixed, the day and year above written.

MINNESOTA & NORTHWESTERN RAILROAD COMPANY,
By A. B. STICKNEY, *President.*
[SEAL.] JOHN I. THOMPSON, *Secretary.*
CHICAGO, ST. PAUL & KANSAS CITY RAILWAY CO.,
By R. T. WILSON, *President.*
[SEAL.] CHANNING BURNS, *Assistant Secretary.*

289 DEFENDANT'S EXHIBIT 15.

Chicago, St. Paul and Kansas City Railway Company
to
Metropolitan Trust Company.

Contract.

This Contract, Made this 8th day of December, A. D. 1887, between the Chicago, St. Paul and Kansas City Railway Company, a corporation under the laws of Iowa, party of the first part, and the Metropolitan Trust Company, of the City of New York, party of the second part, witnesseth:

Whereas, The Chicago, St. Paul and Kansas City Railway Company, hereinafter referred to as "The Railway Company," is duly incorporated, organized and existing under the laws of the State of Iowa, and under and by virtue of its articles of incorporation and the laws of the State of Iowa has full power and authority to construct, lease, purchase, and operate railway and telegraph lines in the States of Iowa, Illinois, Minnesota, Wisconsin, Missouri, Kansas and Nebraska, and in other states and territories; and

Whereas, The Railway Company has constructed and acquired a continuous line of railway extending from the City of Chicago, Illinois, westerly through the City of Dubuque, and northwesterly and northerly from that point to the City of St. Paul, Minnesota;

290 with a branch extending from Hayfield, Minnesota, on said line, southerly to Manley Junction, in the State of Iowa;

also with a branch extending from Sumner, Iowa, on said line, southwesterly and westerly to Hampton, in said state; also a line extending from Oelwein, Iowa, on the first-mentioned line,

southwesterly through Des Moines toward the City of St. Joseph, Missouri, with a branch to the City of Cedar Falls, Iowa, and also a branch to coal mines on the Skunk river; being in all about eight hundred and ten miles of completed single track railway; also about four miles of double track from West St. Paul to South St. Paul, in the State of Minnesota; and

Whereas, The Railway Company is, in and by the general laws of the State of Iowa, authorized to borrow money for the purpose of enabling it to equip and improve its said railways and acquire by purchase or consolidation, or otherwise, or to construct, complete, improve, equip and operate other railways, and for the purpose of raising funds from time to time, the said Railway Company is, by virtue of the said general laws of the State of Iowa, duly authorized and empowered to issue its corporate bonds in sums not less than fifty dollars each, payable to bearer or otherwise, and bearing interest at a rate not exceeding ten per centum per annum, and to sell the said bonds at such rates or prices as the said Railway Company shall deem proper, in such form and bearing such rates of interest, payable at such times and places as the Railway Company, by its Board of Directors, may direct, which bonds they may make convertible into stock, or not as may be deemed expedient, and if
291 such bonds shall be sold below their nominal or par value they shall be valid and binding on the Company, and no plea of usury shall be allowed such corporation in any action or proceeding brought to enforce the collection of said bonds; and

Whereas, The Railway Company proposes to construct and acquire other lines of railway in Iowa and other states in such manner as may be authorized by law; and

Whereas, The Railway Company has, deeming the same necessary and expedient, duly resolved to exercise the borrowing power conferred on it by law, and for that purpose has by resolution of its Board of Directors duly authorized its president and secretary to execute from time to time, as its Board of Directors may by resolution direct, its bonds, to be designated as "Income Bonds," in an amount at no time exceeding ten thousand dollars per mile of railroad actually completed, including any road which has been or may hereafter be purchased, leased, aided or consolidated with; and for the purpose of defining the rights and obligations of the Company and the holders of said Income Bonds, and securing said holders against an overissue of the same, the said Board of Directors has authorized the president and secretary of the Railway Company to execute in its corporate name and deliver to the Metropolitan Trust Company of the City of New York, party of the second part, this contract and obligation of the Railway Company; and

Whereas, Each of said Income Bonds is to be in
292 the words and figures following, subject only to the necessary variations as to the numbers, dates and amounts thereof, each of which is to be for one hundred dollars or a multiple thereof, to-wit:

UNITED STATES OF AMERICA.

No. —. $—.

Chicago, St. Paul and Kansas City Railroad Company.

Income Bond.

For value received the Chicago, St. Paul and Kansas City Railway Company promises to pay, on the first day of July, A. D. 1936, to —— —— the sum of —— Dollars in gold coin of the present standard, at the office or agency of the Railroad Company in the City of New York; with such interest in the meantime in like gold coin, not exceeding five per cent in any year, non-cumulative, as the Directors of the Company may annually fix and declare as the annual installment of interest payable hereon out of net earnings properly applicable to the purpose, before any dividend shall be declared or paid upon the common stock of the Company.

This bond is transferable only in person or by attorney on the books of the Company upon surrender hereof, when a new bond or bonds will be issued in lieu hereof.

This bond is issued under a contract between the Railway Company and the Metropolitan Trust Company of the City of
293 New York, dated the 8th day of December, 1887, and is convertible into preferred stock at the option of the Railway Company or of the payee hereof, in the manner and subject to the terms and conditions of said contract. The amount of Income Bonds is thereby limited to ten thousand dollars per mile of completed railway.

This bond shall not become obligatory until countersigned and registered by the Metropolitan Trust Company of the City of New York.

In Witness Whereof, The Railway Company has caused its corporate seal to be hereto affixed, and these presents to be attested by the signatures of its president and secretary the — day of ——, A. D. 18—.

CHICAGO, ST. PAUL AND KANSAS CITY RAILWAY COMPANY.

By —— ——, *President.*

—— ——, *Secretary.*

Therefore, In consideration of the premises and the sum of one dollar to the Railway Company in hand paid, the receipt of which is hereby acknowledged, it is agreed and declared as follows:

All of the bonds to be issued hereunder shall be issued only by the sanction of the Metropolitan Trust Company of the City of New York, and under the following conditions, to-wit:

The Trust Company, upon the execution and delivery hereof, shall from time to time as requested by the president, duly authorized by resolution of the Board of Directors of the Railway Company, sanction an issue of bonds to the aggregate sum of eight million
294 one hundred thousand dollars with reference to the eight hundred and ten miles of road now owned by the Com-

pany. Thereafter the Trust Company shall sanction further issues of bonds on demand of the president, duly authorized by resolution of the Board of Directors of the Railway Company, and upon affidavits of the president or a vice president and chief engineer of the Railway Company, showing among other things the exact length of the railway or railways acquired or created by the Company; provided, that the aggregate of said bonds shall at no time exceed ten thousand dollars per mile of completed railway. And the said Trust Company is hereby authorized to countersign and register said bonds and all transfers thereof.

It is further agreed and declared that in case the net earnings of the Railway Company properly applicable to the purpose are in any year not sufficient to pay five per cent interest on its income bonds, the said income bonds shall thereupon become convertible and redeemable dollar for dollar at par at the option of the Company, or at the option of the payee of each bond, into preferred stock of said Iowa Company, which preferred stock shall be entitled to a preference dividend out of the net earnings of the Railway Company of five per cent per annum, non-cumulative, before any dividend is paid upon the common stock of said Company. After paying a dividend of five per cent upon common stock of the Company in any year, any further dividend shall be declared ratably upon both common and preferred stock.

295 It is further agreed and declared that in case the Railway Company should have a right to exercise its option to convert the income bonds into preferred stock, and should not avail itself of such option, and some holders of income bonds should convert the same into preferred stock and some should not do so, then and in such case it is the intention hereof that the income bonds shall have the same and an equal right to interest which the preferred stock has to dividend, to the extent of five per cent per annum. That net earnings applicable to the purpose shall be applied equally and proportionately to pay dividends on such preferred stock and interest on the income bonds, to the extent of five per cent per annum, and that each shall have the same preference over common stock.

It is further agreed and declared that the Railway Company will at all times hereafter keep open an office or agency in the City of New York for the payment of interest on said bonds and dividends on its said stock, and for the transfer of said bonds and stock.

It is further agreed and declared that in case of default in any of the covenants hereof, the said Trust Company shall have the right, as representative of said bondholders, and shall be bound, on the request of a majority in interest of the holders of said bonds outstanding, to sue in some court of competent jurisdiction to compel the faithful observance of this contract by the Railway Company.

It is further agreed that the several covenants and agree-
296 ments hereof shall be construed to bind the respective parties and their several successors and assigns as if specifically mentioned in each covenant or agreement.

In Witness Whereof, The Railway Company has caused this contract to be signed on its behalf by its president and secretary,

and its corporate seal to be hereto affixed; and the Trust Company has likewise caused this contract to be signed by its president and secretary and its corporate seal to be hereto affixed, the day and year above written.

CHICAGO, ST. PAUL AND KANSAS CITY RAILWAY COMPANY,
By A. B. STICKNEY, *President.*
JOHN I. THOMPSON, *Assistant Secretary.*
METROPOLITAN TRUST COMPANY OF THE CITY OF NEW YORK,
By THOS. HILLHOUSE, *President.*
CHARLES Y. JESUP, *Secretary.*

Signed, sealed and delivered in presence of

F. W. DAVIS,
R. C. WIGHT,
Witnesses as to the Railway Company.
CHAS. R. THORBURN,
RAYMOND J. STALEY,
Witnesses as to the Trust Company.

297 DEFENDANT'S EXHIBIT 16.

This Indenture, Made the second day of November, 1892, between the Chicago Great Western Railway Company, a corporation duly organized and existing under the laws of the State of Illinois, in the United States of America (hereinafter called the Company), party of the first part, and the Manhattan Trust Company, a corporation duly organized and existing under the laws of the State of New York (hereinafter called the Trustee), party of the second part, witnesseth:

Whereas, The Company is now in possession of under lease and is operating the railway owned by the Chicago, St. Paul and Kansas City Railway Company, a corporation of the State of Iowa, in the United States of America, and also of certain lines leased by the above-named Company, and on which it has running powers. The lines thus operated by the Company extend from the City of Chicago, in the State of Illinois, in a westerly direction through the City of Dubuque, in the State of Iowa, thence via Oelwein to the Cities of St. Paul and Minneapolis, in the State of Minnesota; also from a junction at the said town of Oelwein in a southwesterly direction through the Cities of Waterloo, Marshaltown and Des Moines, in the State of Iowa, and the City of St. Joseph, in the State of Missouri, the city of Leavenworth in the State of Kansas, to Kansas City, in the State of Missouri; also a branch line extending from Hayfield Junction, in the State
298 of Minnesota, through the City of Austin to Manley Junction, in the State of Iowa; also a branch from Sumner Junction, in the State of Iowa, to the City of Hampton, in the said State of Iowa, and also various other short branches in the States of Minnesota and Iowa, in all about 922 miles.

And Whereas, By the laws of the State of Illinois the Company is authorized to purchase and hold the stock and other securities issued by the said Chicago, St. Paul and Kansas City Railway Company, as well as the First Mortgage Bonds issued by the Minnesota and North Western Railroad Company, a corporation of the State of Minnesota, and is also authorized to purchase, hold and operate the railway and other property of the said Chicago, St. Paul and Kansas City Railway Company.

And Whereas, The said Minnesota and North Western Railroad Company has heretofore issued $9,628,000 First Mortgage five per cent. Gold (bearer) Bonds, maturing in 1834, which bonds are now outstanding and the payment of both principal and interest of said bonds has been assumed by the Chicago, St. Paul and Kansas City Railway Company, and the said Chicago, St. Paul and Kansas City Railway Company has heretofore issued and has now outstanding $9,326,000 five per cent. (bearer) Gold Bonds; also $5,386,000 General Mortgage four per cent. Bonds; also $4,981,700 Income Bonds bearing five per cent. non-accumulative payable only when earned; also $14,892,900 Stock; also $2,823,150 five per cent. Sterling Priority Loan; also $1,723,430.97 Rolling Stock Lease Warrants, bearing interest at the rate of seven per cent. per annum, payable monthly; that is to say the said Chicago, St. Paul and Kansas City Railway Company has now outstanding the following securities:

(1)	Rolling Stock Lease Warrants	$1,723,430.97
(2)	Five per cent. Priority Loan	2,823,150.00
(3)	Minnesota and North Western First Mortgage Five per cent. Bonds	9,628,000.00
(4)	Chicago, St. Paul and Kansas City First Mortgage Five per cent. Bonds	9,326,000.00
(5)	Chicago, St. Paul and Kansas City General Mortgage Four per cent. Bonds	5,386,000.00
(6)	Chicago, St. Paul and Kansas City Income Bonds Five per cent. contingent	4,981,700.00
(7)	Chicago, St. Paul and Kansas City Stock	14,892,900.00

And Whereas, The Company has purchased and now holds in its treasury more than two-thirds to-wit: $10,094,800 nominal value of the stock of the Chicago, St. Paul and Kansas City Railway Company, and $4,886,000 of the General Mortgage four per cent. Bonds issued by said Company (the balance $500,000 of said General Mortgage four per cent. Bonds being still owned by the Chicago, St. Paul and Kansas City Railway Company, but pledged as collateral to its Rolling Stock Lease Warrants), and $1,115,520 of said Income Bonds, and is desirous of purchasing the balance of said Income Bonds and Stock, and the whole of the said First Mortgage five per cent. Gold Bonds issued by both the said Minnesota and North Western Railroad Company and the Chicago, St. Paul and Kansas City Railway Company.

And Whereas, For the purpose of purchasing the said First Mortgage five per cent. Gold Bonds, and for the other purposes herein-

after expressed, the Company has determined to create $15,000,000 nominal value of Four Per Cent. Debenture Stock and $15,000,000 nominal value of Five Per cent. Preferred Stock A, and to secure the payment of the interest or dividends on said stock as hereinafter expressed.

And Whereas, In pursuance of said determination, the Company has agreed to execute this Trust Deed and Contract and to enter into the covenants hereinafter contained with the Trustee for the holders of the said stocks for the time being.

Now, This Indenture Witnesseth, That in pursuance of said agreement, and in consideration of the premises, the Company hereby grants, bargains, sells and conveys to the Trustee, its successors and assigns, all the railway and its equipments, rolling stock and appurtenances which the Company now has or may hereafter become possessed of by purchase, lease or otherwise either by private treaty or foreclosure sale from the Chicago, St. Paul and Kansas City Railway Company. Also all the First Mortgage five per cent. Gold Bonds hereinbefore mentioned as issued and now out-
301 standing by either the Minnesota and North Western Railroad Company or the Chicago, St. Paul and Kansas City Railway Company which the Company now has or may hereafter be possessed of. Also all the railroad cars, locomotives and other rolling stock which the Company may hereafter become possessed of by reason of payment of the Rolling Stock Lease Warrants heretofore issued by the Chicago, St. Paul and Kansas City Railway Company, or by purchase with the proceeds of any securities issued hereunder and secured hereby. Also all the stock of which the Company may hereafter become possessed of or in the Railway Equipment Company of Minnesota, the lessor of the rolling stock for which the Rolling Stock Lease Warrants hereinbefore referred to have been issued. Also all of said Rolling Stock Lease Warrants or the Bonds issued by said Railway Equipment Company against said Rolling Stock Lease Warrants which the Company may hereafter become possessed of by purchase. To have and to hold unto the Trustee and its successor and assigns but in trust to secure the holders of the 4% Debenture Stock and 5% Preferred Stock A of the Chicago Great Western Railway Company in the manner and for the uses and purposes and subject to the terms, conditions and agreements expressed and contained in this indenture.

And it is hereby mutually covenanted, agreed and declared between and by the parties hereto in manner following, that is to say:

1. The fiscal year of the Company shall be considered as begin-
ning on the first day of July in each year and terminating
302 on the last day of June in the following year and the "half-year" as hereinafter used shall be construed to mean either the six months beginning with the first day of July and terminating with the last day of December, or the six months beginning with the first day of January and terminating with the last day of June of each year as shall be determined by the context.

2. Whereas the Chicago, St. Paul and Kansas City Railway Company has leased tracks and terminal facilities in the City of

Chicago, in the State of Illinois, and in the City of Des Moines, in the State of Iowa, and is under obligations to pay certain charges for the use of the Union depot, in the City of St. Paul, and for the use of the privileges of the Minnesota Transfer Railway Company, in the City of St. Paul, in the said State of Minnesota, and has leased running rights on the Dubuque bridge and other properties from the Dunleith and Dubuque Bridge Company, also over certain tracks owned by the Illinois Central Railroad Company, and certain tracks owned by the Chicago, Burlington and Northern Railroad Company, and certain tracks owned by the St. Paul and Northern Pacific Railway Company, and over certain tracks belonging to various railway companies between the terminus of its own line in the City of St. Joseph, in the State of Missouri, and its terminal property in the City of Kansas City, in the State of Missouri, including a bridge over the Missouri river at or near Leavenworth, in the State of Kansas. Now, it is agreed that the amounts
303 due on these various leases and contracts, together with the interest at the rate of seven per cent. per annum on its Rolling Stock Lease Warrants, and the interest on its Priority Loan, shall be a prior charge upon the net income of the premises hereby conveyed, and the aggregate of these amounts, together with taxes and any other amounts which may hereafter be agreed to be paid for rentals (with the consent of the Finance Committee hereinafter provided for), and interest on bonds or other securities which may hereafter be issued and made prior to the Company's 4% Debenture Stock, in manner and form hereafter provided, shall collectively, for sake of convenience in this contract, be termed Prior Charges.

3. On the fifteenth day of January, 1893, and on every fifteenth day of July and January thereafter, the Company agrees to pay in gold to the holders of record on the last day of the preceding December and June of the 4% Debenture Stock two per cent. interest for the preceding half-year, making an aggregate of four per cent. per annum. In consideration of this guaranteed interest the holders of said stock shall not be entitled to participate further in the earnings of the Company; but it is expressly agreed that no dividends shall be paid upon any subordinate stock of the Company until all accrued interest upon the 4% Debenture Stock shall have been paid or provided for.

4. As to the Preferred Stock A inasmuch as the financial year runs from 1st July to 30th June, and the net earnings are usually more in the half-year ending 31st December than in the
304 half-year ending 30th June, the Company shall so soon as practicable make up an accurate statement of its earnings and expenses for each half-year, and the balance of earnings over expenses shall be considered the net earnings of the Company for that half-year. Out of such net earnings in each half-year all prior charges and interest on the Debenture Stock shall be paid or provided for. The surplus in the half-year ending 31st December up to an amount sufficient to pay 2½% dividend in gold on the 5% Preferred Stock A shall be applied for that purpose, and any further surplus shall be carried forward to the next half-year, the

ultimate balance of net earnings in each year ending 30th June after payment of interest on the Debenture Stock and 5% in gold on Preferred Stock A being applicable to dividends upon the 4% Preferred Stock B and the Common Stock of the Company.

5. In case of liquidation the net assets of the Company shall be applicable to the payment in gold of the capital of the different classes of stocks or securities in the same order of priority as the interest or dividends on such stocks or securities are provided to be paid.

6. No certificate for either 4% Debenture Stock or for 5% Preferred Stock A, and no other security issued hereunder, shall be valid or binding upon the Company, or entitled to participate in the benefits of this indenture, until countersigned and registered by the Trustee, and all original issues of said stocks and securities shall be so countersigned and registered by the Trustee in
305 New York, but for the purpose of convenience in making transfers of said stocks and securities, the Trustee is authorized and it shall be its duty to establish and maintain in the City of London an agency for registering transfers of said stocks and securities. Transfer Certificates or fresh Stock Certificates, countersigned and registered by said agency shall be as valid and binding as though countersigned and registered by the Trustee, and it shall be the duty of said agency at the close of each calendar month to report to the Trustee, at its office in New York, in such manner and form as the Trustee may require, all transfers registered or fresh Stock Certificates issued by said agency during said calendar month.

7. For each of the said First Mortgage five per cent. Gold Bonds of the nominal value of $1,000, with the coupon of January, 1893, and all subsequent coupons annexed, issued by the Minnesota and North Western Railroad Company or by the Chicago, St. Paul and Kansas City Railway Company the Company agrees to give $500 4% Debenture Stock and $600 5% Preferred Stock A, bearing interest or dividend from 1st of July, 1892, and upon deposit of any of said bonds with the Trustee, or with its agent in London, it shall be the duty of the Trustee to countersign and register the stock to be issued in exchange therefor. In addition thereto, upon the request of the Finance Committee the Trustee shall countersign and register $2,000,000 of said 4% Debenture Stock.

8. The said First Mortgage five per cent. Gold Bonds when
306 thus exchanged shall be deposited with the Trustee in the City of New York, or with its agent in London, and when so deposited shall be held by the Trustee subject to the trusts created by this indenture and to the agreements herein contained.

9. On the second Wednesday of January, 1893, and annually on the second Wednesday of each January thereafter there shall be convened, in the manner set forth in the Schedule hereto attached, a general meeting of the holders of the 4% Debenture Stock and of the 5% Preferred Stock A collectively, at which meeting, in the manner and form provided in the attached schedule, shall be elected a committee of not less than three and not more than five holders of either of said stocks, which shall be known as the Finance Com-

mittee of the Company, and shall hold office until successors are elected. If through mistake or otherwise an election should not be held on the day designated, the Committee may appoint another day, of which due notice shall be given, for holding a meeting for the election of said Committee. If a casual vacancy should occur in said Committee, the remaining members may fill the vacancy. The powers, duties and regulations in respect to said Committee contained in the schedule hereto attached shall be considered a part of this agreement, and as effectual and binding as though repeated here.

10. The said Finance Committee shall have authority to exercise general supervision and control of the finances of the Company. They shall have the right and the authority by an agent
307 (being a skilled accountant) duly appointed by them at any and all times to examine the accounts and books of the Company and audit the same. And if at any time a controversy should arise as to the amount of net earnings applicable to the payment of dividends on the 5% Preferred Stock A, the matter in controversy shall be left to the arbitration of said Finance Committee, and the decision of said Committee shall be final and conclusive.

11. None of the 4% Debenture Stock or 5% Preferred Stock A, except as provided in clause 7 hereof, shall be issued by the Company, or countersigned and registered by the Trustee without the consent in writing first obtained of said Finance Committee acting with the consent of the holders of said stocks, in the manner hereinafter provided, and no stocks or securities shall be issued by the Company and be made a charge prior to the 4% Debenture Stock, or subordinate to that stock, but prior to the 5% Preferred Stock A, without the consent in writing of said Finance Committee, acting with the consent of the holders of said stocks in manner hereinafter provided.

12. Whenever and as often as the Board of Directors of the Company shall deem it for the interest of the undertaking that additional 4% Debenture Stock or 5% Preferred Stock A should be issued the Board of Directors may adopt a resolution specifically stating the amount of stock and the class or classes of stock they deem it advisable to have issued, and the purposes to which they deem it desirable to devote the proceeds thereof, which resolution shall
308 be entered in the minutes of the board and certified copy thereof filed with the Finance Committee, and thereupon it shall be the duty of the Finance Committee to call an extraordinary general meeting of the holders of both classes of stock in the City of London, at which meeting shall be submitted the said resolution of the Board of Directors, and if at said meeting the holders of a majority in amount of those stocks collectively, present in person or by proxy, vote in favor of approving the whole or any part of the recommendation of the Board of Directors the Finance Committee shall thereupon be authorized and it shall be their duty to direct the Trustee to countersign and register the additional stock or stocks so authorized.

13. Whenever and as often as the Board of Directors of the Com-

pany shall deem it for the interest of the undertaking that bonds or other securities should be issued by the Company and be made a charge upon the undertaking prior to the 4% Debenture Stock or subordinate to that stock, but prior to the 5% Preferred Stock A, the Board of Directors may adopt a resolution specifically stating the amount and kinds of securities it deems advisable to have issued and made a prior charge upon the undertaking, and the purposes to which they deem it advisable to devote the proceeds thereof, which resolution shall be entered in the minutes of the board and a certified copy thereof filed with the Finance Committee, and thereupon it shall be the duty of the Finance Committee to call an
309 extraordinary general meeting of the holders of both classes of stock in the City of London, at which meeting shall be submitted the said resolution of the Board of Directors, and if at said meeting the holders of two-thirds in amount of those stocks collectively present in person or by proxy vote in favor of approving the whole or any part of the recommendation of the Board of Directors, the Finance Committee shall thereupon be authorized and it shall be their duty to direct the Trustee to countersign and register the securities so authorized, and such authorization shall be considered in law and in fact as the consent of each and every holder of 4% Debenture Stock and 5% Preferred Stock A that such securities may be issued, and be secured hereby, and be a prior charge upon the undertaking in conformity to said vote.

14. Whenever new issues of stocks or securities shall be made pursuant to the foregoing provisions, the Finance Committee shall superintend or approve the sale of such issues, and the appropriation of the proceeds thereof to the specific purposes for which they were authorized.

15. The security hereby constituted shall become enforceable in each and every one of the events following, that is to say:

(*a*) If the Company shall make default in the payment of any interest as and when it may become due on the 4% Debenture Stock, and such default shall continue for six months, and the Trustee shall be required to enforce the security hereby constituted by extraordinary resolution of the holders of a majority in
310 amount of that stock present in person or by proxy at a meeting to be convened and held in manner provided in the schedule hereto.

(*b*) If the Company shall fail to appropriate its net earnings in accordance with the agreement contained in clause 4 hereof in payment of dividend on the 5% Preferred Stock A, and such default shall continue for six months, and the Trustee shall be required to enforce the security hereby constituted by extraordinary resolution of the holders of a majority in amount of that stock present in person or by proxy at a meeting to be convened and held in manner provided in the schedule hereto.

(*c*) If an order shall be made or an effective resolution shall be passed for the winding up of the Company.

(*d*) If default shall be made by the Company in the performance of any covenant, condition or obligation binding on the Company

under the terms of these presents and the Finance Committee shall certify that in their opinion the security ought to be enforced, and if during such default the Trustee shall be required to enforce the same by extraordinary resolution of the holders of a majority in amount of the 4% Debenture Stock and 5% Preferred Stock A collectively present in person or by proxy at a meeting to be convened and held in manner provided in the schedule thereto.

16. Until the security hereby constituted becomes enforceable the Trustee shall permit the Company to retain possession of the
311 premises hereby conveyed, and to carry on in and therewith its business, and to take, receive and enjoy the revenues and incomes arising from the premises, and to deal with the same upon the footing that the charge hereby created is a floating charge, except that as to the First Mortgage Bonds received by the Trustee in exchange for 4% Debenture Stock and 5% Preferred Stock A, and any other securities which may hereafter be purchased with the proceeds of sale of any 4% Debenture Stock or 5% Preferred Stock A, or received in exchange therefor, the Trustee shall retain possession thereof, but until this security becomes enforceable the Trustee shall pay over to the Company all incomes derived therefrom either as interest upon said bonds or as interest or dividends upon such other securities.

17. At any time after the security hereby constituted becomes enforceable the Trustee may enter and take possession of the premises hereby conveyed, or may appoint a receiver thereof, and such appointment may be made after the Trustee has entered as aforesaid, or without and before entry, and the Trustee may at any time by writing remove any receiver so appointed and appoint another in his stead, and the Trustee shall appoint a receiver under the foregoing power if and when required so to do by the Finance Committee, acting under authority of an extraordinary resolution of the holders of the 4% Debenture Stock and the 5% Preferred Stock A collectively. The receiver so appointed shall be a person
312 approved by the Finance Committee, and in his management of the property as receiver, and in the appropriation of the net earnings of the undertaking, he shall at all times act subject to the control of the Finance Committee. And while such receiver is in possession the Finance Committee shall have the same control over the undertaking and its revenues that the Board of Directors of the Company has over the same before this security becomes enforceable. And it shall be the duty of the Trustee at any time, upon the request of the Finance Committee, and as often as requested, to remove the receiver and appoint another receiver approved by the Finance Committee in his stead.

18. The remuneration of a receiver appointed as aforesaid shall be fixed by the Finance Committee as they shall from time to time think fit.

19. A receiver appointed as aforesaid may, with the approval of the Finance Committee, delegate all or any of the powers, authorities and discretions for the time being vested in him, but neither the Trustee nor the Finance Committee shall be in any wise responsible for any misconduct on the part of any such delegate.

20. The Trustee or the Finance Committee may from time to time, or at any time, require any receiver appointed as aforesaid to give security for the due performance of his duties as such receiver, and may fix the nature and amount of the security so to be given, but the Trustee and the Finance Committee shall not be bound in any case to require any such security unless they shall be re-
313 quested so to do by extraordinary resolution of the holders of the 4% Debenture Stock and the 5% Preferred Stock A collectively.

21. While the undertaking is in the possession and under the management of a receiver under the control of the Finance Committee any ultimate balance of the net earnings in each year ending 30th June, as hereinbefore described or defined, and after discharge of all expenses of the receivership shall be paid over within three months after the close of each year to the Company and whenever the Company shall make good its default, and if so required by the Finance Committee give reasonable additional security against future default, the receiver shall be discharged and the possession and management of the railway revert to the Company, subject to the provisions of this indenture in any case of future default.

22. When the Trustee shall come into possession under the terms of this indenture of a majority of the First Mortgage Bonds issued by the Minnesota and North Western Railroad Company, or of a majority of the First Mortgage Bonds issued by the Chicago, St. Paul and Kansas City Railway Company, it shall be the duty of the Trustee, upon request of the Finance Committee, if said bonds or either class thereof are in default, and the mortgages or mortgage securing the bonds in default are thereby enforceable, to proceed to foreclose the same for the purpose of getting the title of the property comprised in such mortgages or mortgage as the case
314 may be vested in the Company, to be held by the Company subject to this indenture. In all matters pertaining to the management of said bonds, to the foreclosure of said mortgages, or to the waiving of default thereunder, the Trustee shall at all times be governed and directed by the Finance Committee.

23. At any extraordinary general meeting of the holders of 4% Debenture Stock and 5% Preferred Stock A collectively by extraordinary resolution the Trustee may be removed and a new Trustee appointed, or, in case of a vacancy, a new Trustee may be appointed, and when a new Trustee shall be thus appointed such Trustee shall succeed to all the rights, powers and duties of the Trustee.

24. The Company shall in each and every year during the continuance of this security pay to the Trustee a reasonable compensation, and to each member of the Finance Committee the sum of $500 by equal half-yearly payments on the 30th June and the 31st December, in addition to all traveling and other costs, charges and expenses incurred in relation to the execution of the trusts or duties hereof.

25. The Company shall also at all times hereafter keep harmless and indemnify the Trustee and each of the Finance Committee, respectively, and their respective estates and effects from and against all actions, proceedings, costs, charges, claims and demands what-

soever in respect to the execution of the trusts and duties hereof, or in respect of any matter or thing done or omitted relating to the premises.

26. The first and second schedules hereto shall have effect
315 in the same manner as if herein set forth, but the wording of forms of certificates in the first schedule may be varied according to circumstances.

27. The Trustee may from time to time, and at any time, with the consent of the Finance Committee, but not otherwise, waive, on such terms and conditions as to the Finance Committee shall seem expedient, any breach by the Company of any of the covenants herein contained.

28. The Trustee, with the consent of the Finance Committee, may delegate to any agent or agents all or any of the trusts, powers or discretions hereby vested in the Trustee, and such delegation may be made on such terms and conditions and subject to such regulations (including power to sub-delegate) as the Trustee and Finance Committee may think fit, and the Trustee and Finance Committee shall be in no wise responsible for any misconduct on the part of any such delegate or sub-delegate.

29. The action of a majority of the Finance Committee shall be deemed to be the action of the Committee and shall operate and take effect accordingly.

30. The Company shall maintain an agency in London for the purpose of paying interest and dividends upon 4% Debenture Stock and upon 5% Preferred Stock A, and of facilitating transfers of said stocks. For the purpose of paying interest and dividends it is agreed that the transfer books of said stocks may be closed
316 from the 1st June until 15th July, and from the 1st December until 15th January.

In Witness Whereof, The Company and the Trustee have caused their respective corporate seals to be hereto attached and this indenture to be signed by their respective Presidents and Secretaries.

CHICAGO GREAT WESTERN RAILWAY COMPANY,
By JOHN M. EGAN, *President.*

Attest:
ROBERT C. WIGHT, *Secretary.*
[CORPORATE SEAL.]

In presence of
SAM C. STICKNEY.
JOHN M. BLAKELEY.

MANHATTAN TRUST COMPANY,
By FRANCIS O. FRENCH, *President.*

Attest:
A. T. FRENCH, *Secretary.*
[CORPORATE SEAL.]

In presence of
W. H. OSBORNE.
WM. NORTH DUANE.
W. H. OSBORNE.

(Duly acknowledged.)

317 The Schedules Above Referred To.

First Schedule.

Form of Certificate of 4% Debenture Stock.

No. —. Number of Shares —.

This Certifies that —— —— is the owner of —— Shares of the nominal value of $100 each in the 4% Debenture Stock of the Chicago Great Western Railway Company, a corporation duly organized and existing under the laws of the State of Illinois, in the United States of America, transferable only on the books of the Company in person or by attorney on return and surrender of this certificate, when a certificate or certificates of like tenor will be issued to the assignee.

The Chicago Great Western Railway Company agrees that on the 15th day of January, 1893, and on every 15th day of each January and July thereafter the Company will pay to the holder of record the last day of the preceding December and June of said shares in said Debenture Stock two per cent. interest for the preceding half-year, making an aggregate of four per cent. per annum, and in consideration of this guaranteed interest, the holder of said shares shall not be entitled to participate further in the earnings of the Company, but it is expressly agreed that no dividends shall be paid on any subordinate stocks of the Company until all accrued
318 interest upon the Debenture Stock shall have been paid or provided for. And to secure this agreement, and for other purposes, the Chicago Great Western Railway Company has made a deed of trust and contract, bearing date the second day of November, 1892, to and with the Manhattan Trust Company, a corporation of the State of New York, as Trustee, and this certificate is issued under and in accordance with said trust deed and contract, and the holder hereof is entitled to all the benefits and is subject to all the conditions contained in said trust deed and contract, but this certificate is not binding upon the Company, nor entitled to the benefit of said trust deed and contract, until it is countersigned and registered by the Trustee in the City of New York, or by its duly authorized agent in the City of London, England.

In Witness Whereof, The Chicago Great Western Railway Company has caused this certificate to be signed by either its Chairman or President or a Vice President and by its Secretary or an Assistant Secretary this — day of —— 18—.

—— ——,
Chairman Vice President.

——,
Assistant Secretary.

Countersigned and Registered this — day of —— 18—.
MANHATTAN TRUST COMPANY.
By —— ——.

319 Endorsement.

For value received —— hereby sell, assign and transfer unto —— —— shares of 100 dollars each of the stock named in the with- certificate and —— hereby constitute and appoint —— —— true and lawful attorney, irrevocable, for —— and in —— name and stead to make and execute all necessary acts of assignment and transfer, surrender and cancellation, and one or more persons to substitute with like full power.

Dated —— —, 18—.

—— ——.

In presence of

—— ——.

—— ——.

First Schedule (Continued).

Form of Certificate of 5% Preferred Stock A.

No. —. Number of Shares —.

This Certifies that —— —— is the owner of —— Shares of the nominal value of $100 each in the 5% Preferred Stock A of the Chicago Great Western Railway, a corporation duly organized and existing under the laws of the State of Illinois, in the United States of America, transferable only on the books of the Company in person or by attorney on return and surrender of this certificate,
320 when a certificate or certificates of like tenor will be issued to the assignee.

Inasmuch as the financial year runs from 1st July to 30th June, and the net earnings are usually more in the half-year ending 31st December than in the half-year ending 30th June, the Company agrees so soon as practicable to make up an accurate statement of its earnings and expenses for each half-year, and the balance of earnings over expenses shall be considered the net earnings of the Company for that half-year. Out of such net earnings in each half-year all prior charges and interest on the Debenture Stock shall be paid or provided for. The surplus in the half-year ending 31st December up to an amount sufficient to pay 2½% dividend in gold on the 5% Preferred Stock A shall be applied for that purpose, and any further surplus shall be carried forward to the next half-year, the ultimate balance of net earnings in each year ending 30th June after payment of interest on the Debenture Stock and 5% in gold on the Preferred Stock A being applicable to dividends upon the 4% Preferred Stock B and the Common Stock of the Company.

And to secure this agreement, and for other purposes, the Chicago Great Western Railway Company has made a deed of trust and contract, bearing date the second day of November, 1892, to and with the Manhattan Trust Company, a corporation of the State of New York, as Trustee, and this certificate is issued under and in accordance with said trust deed and contract, and the holder
321 hereof is entitled to all the benefits and is subject to all the conditions contained in said trust deed and contract, but

this certificate is not binding upon the Company, nor entitled to the benefit of said trust deed and contract, until countersigned and registered by the Trustee in the City of New York, or by its duly authorized agent in the City of London, England.

In Witness Whereof, The Chicago Great Western Railway Company has caused this certificate to be signed by either its Chairman or President or a Vice President and by its Secretary or an Assistant Secretary this — day of ——, 18—.

—— ——,
Chairman, Vice President.

—— ——,
Assistant Secretary.

Countersigned and Registered this — day of ——, 18—.
MANHATTAN TRUST COMPANY,
By —— ——.

Endorsement.

For value received — hereby sell, assign and transfer unto —— —— — shares of 100 each of the stock named in the within certificate, and —— hereby constitute and appoint —— —— true and lawful attorney, irrevocable, for —— and in —— name and stead to make and execute all necessary acts of assignment and
322 transfer, surrender and cancellation, and one or more persons to substitute with like full power.

Dated —— —, 18—.

—— ——.

In presence of
—— ——.
—— ——.

Second Schedule.

Meeting of Holders of 4% Debenture Stock and 5% Preferred Stock A.

1. The Finance Committee or the Company may respectively at any time convene a meeting of the holders of the Debenture Stock and of the 5% Preferred Stock A collectively, or of the holders of either of such classes of stock separately, and the Finance Committee shall convene such meetings on the request in writing of persons holding one-tenth of the nominal amount of such stocks for the time being collectively for a meeting of holders of both classes of stock, or one-tenth of the nominal amount of either class of stock for the time being, for a meeting of holders of that class of stock separately. All meetings convened as aforesaid shall be known as Extraordinary General Meetings, and resolutions adopted at such meetings shall be known as Extraordinary Resolutions. Meetings held for the purpose of electing the Finance Committee, as provided in the trust deed, shall be known as Ordinary General Meetings. All
323 meetings, whether Extraordinary or Ordinary, shall be held in the City of London, at such time and place as shall be designated in the notice of meeting.

2. Notice shall be given of every meeting, Extraordinary or Ordinary, by two advertisements in two leading daily newspapers published in the City of London not less than fifteen and not more than thirty clear days before the day of the meeting, and the notice shall specify the place, day and hour of meeting, and the object for which the meeting is convened.

3. Holders of one-tenth of the nominal amount of the Debenture Stock and 5% Preferred Stock A collectively for a meeting of holders of both classes of stock and holders of one-tenth of the nominal amount of either class of stock for a meeting of holders of that class of stock separately, shall form a quorum for the transaction of business, and no business shall be transacted at any meeting unless the requisite quorum be present at the commencement of the business.

4. Some person nominated by the Finance Committee, or any member or members of the Committee present, shall take the chair at such meeting, and if no such person is nominated, or if at any meeting the person nominated shall not be present within fifteen minutes after the time appointed for the time for holding the meeting, the stockholders present shall choose one of their number to be Chairman. The Trustee, or any person duly authorized to represent the Trustee, and any Director of the Company, may attend any meeting

324 5. If within half an hour from the time appointed for any meeting a quorum is not present the meeting shall stand adjourned to the same day in the next week, at the same time and place, and if at such adjourned meeting a quorum is not present the holders of stock present shall form a quorum, and may transact any business which a meeting of the holders of one-tenth of the stock concerned is competent to transact.

6. Every question submitted at a meeting of stockholders shall be decided in the first instance by a show of hands, and in case of equality of votes, the Chairman shall, both on the show of hands and at the poll, have a casting vote in addition to the vote or votes to which he may be entitled as a holder of stock.

7. At any meeting of stockholders, unless a poll is demanded by at least three stockholders, a declaration by the Chairman that a resolution has been carried, or carried by any particular majority, or lost or not carried by a particular majority, shall be conclusive evidence of the fact.

8. If at any such meeting a poll is demanded by the Chairman, or by three or more stockholders, it shall be taken in such manner and either at once or after an adjournment, as the Chairman directs, and the result of such poll shall be deemed to be the Resolution of the meeting at which the poll was demanded.

9. The Chairman may, with the consent of any such meeting, adjourn the same from time to time.

325 10. Any poll demanded at any meeting on the election of a chairman, or on any question of adjournment, shall be taken at the meeting without adjournment.

11. At any meeting the holders of stock registered at the close of business on the thirtieth day prior to such meeting, and no other

person or persons, shall be recognized and treated as the legal holders thereof. Stockholders shall have the right to vote at such meeting either in person or by proxy filed with the Chairman of the meeting at the time of such meeting.

12. At any meeting stockholders shall be entitled to one vote in respect of each share of stock of the nominal value of $100.

13. At Ordinary General Meetings the stockholders shall have the right to elect the Finance Committee to serve for the next ensuing year and until successors shall be elected.

14. At Extraordinary General Meetings of holders of Debenture Stock and 5% Preferred Stock A collectively in addition to any powers conferred by the trust deed the stockholders shall have the following powers exercisable by Extraordinary Resolution, viz.:

(*a*) Power to sanction the release of any premises comprised in or subject to the trust deed.

(*b*) Power to sanction any compromise or arrangement proposed to be made between the Company and any holders of stocks or securities of the Company.

(*c*) Power to sanction any modification of the rights of
326 holders of Debenture Stock or 5% Preferred Stock A against the Company or against its property whether such rights shall arise under the trust deed or otherwise.

(*d*) Power to assent to any modification of the provisions contained in the trust deed, whether in regard to any proposal by the Company under clauses 12 and 13 of the trust deed or otherwise.

15. An Extraordinary Resolution passed at any Extraordinary General Meeting of the holders of Debenture Stock and 5% Preferred Stock A collectively, or of either class of such stocks separately, shall be binding upon all stockholders concerned, whether present or not present at such meeting, and each of such stockholders shall be bound to give effect thereto accordingly.

16. The expression Extraordinary Resolution, when used in this schedule or in the trust deed, means a resolution passed at an Extraordinary General Meeting, duly convened and held in accordance with the provisions herein contained, by the holders present in person or by proxy of a simple majority or of two-thirds in amount of the stocks or stock represented at the meeting as the case may require according to the provisions of the trust deed.

17. Minutes of all resolutions and proceedings at every meeting shall be made and duly entered in books to be from time to time provided for that purpose by the Trustee at the expense of the Company. Minutes purporting to be signed by the Chairman of the meeting at which such resolutions were passed or proceed-
327 ings had, shall be conclusive evidence of the matters therein stated, and, until the contrary is proved, every such meeting, in respect to the proceedings of which minutes have been made, shall be deemed to have been duly held and convened and all resolutions passed or proceedings had thereat shall be deemed to have been duly passed and had.

18. Immediately after election the Finance Committee shall appoint one of their number to be Chairman, who shall serve as Chair-

man until the next annual election of the Committee. The Chairman of the Finance Committee shall be the custodian of the minute books and of the records of the proceedings of the Finance Committee. At each Ordinary General Meeting all recorded proceedings of the Finance Committee since the last preceding Ordinary General Meeting shall be read if required for the information of stockholders. The records of the proceedings of the Finance Committee purporting to be signed by the Chairman of the Committee shall be conclusive evidence of the matters therein stated.

19. Meetings of the Finance Committee may be called to be held in London at any time on two day's notice by any member of the Committee, and when all the members of the Committee are present may be held without notice.

20. At a meeting of the Finance Committee a majority of the members shall constitute a quorum, and resolutions passed or proceedings had at any meeting by a majority of the members of the Committee shall be taken and held to be the action of the Committee.

328 DEFENDANT'S EXHIBIT 19.

Know All Men by These Presents, That I, Robert W. Lowber, of the City of New York, have made, constituted and appointed, and by these presents do make, constitute and appoint Edward Stearns, of said city, my true and lawful attorney for me and in my name, place and stead, to subscribe upon the books of subscriptions for the capital stock of the Minnesota and North Western Railroad Company, for seventy-five hundred shares of the capital stock of the said Company, and to pay ten per cent. of the amount of such capital stock, giving and granting unto my said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises, as fully, to all intents and purposes, as I might or could do if personally present, with full power of substitution and revocation, hereby ratifying and confirming all that my said attorney or his substitute shall lawfully do or cause to be done by virtue hereof.

In Witness Whereof, I have hereunto set my hand and seal the third day of May, in the year one thousand eight hundred and fifty-four.

ROBERT W. LOWBER. [SEAL.]

Sealed and delivered in the presence of
JAMES E. BYRNE.

329 DEFENDANT'S EXHIBIT 20.

Know All Men by These Presents, That I, George W. Billings, have made, constituted and appointed, and by these presents do make, constitute and appoint Edward Stearns my true and lawful attorney for me and in my name, place and stead to subscribe upon the books of subscriptions for the capital stock of the Minnesota and

North Western Railroad Company for two thousand shares of the capital stock of the said Company, and to pay ten per cent. of the amount of such stock, giving and granting unto my said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises as fully, to all intents and purposes, as I might or could do if personally present, with full power of substitution and revocation, hereby ratifying and confirming all that my said attorney or his substitute shall lawfully do or cause to be done by virtue hereof.

In Witness Whereof, I have hereunto set my hand and seal the first day of May, in the year one thousand eight hundred and fifty-four.

GEO. W. BILLINGS. [SEAL.]

Sealed and delivered in the presence of
GEO. W. HODGES.

330 DEFENDANT'S EXHIBIT 21.

Know All Men by These Presents, That I, Geo. C. Stearns, have made, constituted and appointed, and by these presents do make, constitute and appoint Edward Stearns my true and lawful attorney for me and in my name, place and stead, to subscribe upon the books of subscriptions for the capital stock of the Minnesota and North Western Railroad Company, for five hundred shares of the capital stock of the said Company, and to pay ten per cent. of the amount of such stock, giving and granting unto my said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises as fully, to all intents and purposes, as I might or could do if personally present, with full power of substitution and revocation, hereby ratifying and confirming all that he, my said attorney, or his substitute shall lawfully do or cause to be done by virtue hereof.

In Witness Whereof, I have hereunto set my hand and seal the first day of May, in the year one thousand eight hundred and fifty-four.

GEO. C. STEARNS.

Sealed and delivered in the presence of
GEO. W. BILLINGS.

331 DEFENDANT'S EXHIBIT 22.

In accordance with the provisions of an act passed by the Legislative Assembly of the Territory of Minnesota, and approved by the Governor thereof on the fourth day of March, eighteen hundred and fifty-four entitled "An Act to incorporate The Minnesota and North Western Railroad Company."

We, the undersigned, do hereby severally subscribe for the number of shares of the capital stock of the said "The Minnesota and North Western Railroad Company" set opposite our respective names.

and severally and respectively promise and agree to pay therefor according to the provisions of the said act of incorporation.

Date.	Names of subscribers.	Number of —.
1854.		
June 30.	Robert W. Lowber, by his agent and attorney in fact, Edward Stearns.	Seventy-five hundred shares.
June 30.	George W. Billings, by his agent and attorney in fact, Edward Stearns.	Two thousand shares.
June 30.	George C. Stearns, by his agent and attorney in fact, Edward Stearns.	Five hundred shares.

332 DEFENDANT'S EXHIBIT 23.

For value received, I hereby sell, transfer and convey to John M. Barbour twelve hundred and fifty shares of the capital stock of the Minnesota and North Western Railroad Company.

New York, June 25, 1859.

GEO. W. BILLINGS.

DEFENDANT'S EXHIBIT 24.

NEW YORK, *January* 26, 1872.

My dear Mr. Rice:

Judge Barbour has informed me of the proposal of Mr. Marshall, and I have said to him to accept, and that he take 2/3 of the proceeds and yourself 1/3, which I believe he has explained to you heretofore.

As to the ownership of the stock and rights of the M. & N. W., I suppose that they were nearly all in myself, in fact all except such as has been vested in yourself and Judge Barbour.

I have therefore handed the Judge a transfer in blank of 7,500 shares, covering the original subscription in my name.

I have at various times set aside shares to enable various gentlemen to act as directors to keep the board full and the Company in life, all of which has been reinvested in me when they came to act as directors, and so far as I know the assignment or transfer
333 of the interests of yourself, Judge Barbour and myself covers and embraces the entire interest.

Upon the opposite page I have made the assignment referred to, and so far as I am concerned conveys the entire interest I have to Judge Barbour, to be disposed of as he may see fit.

With kind regards for Mrs. Rice and your family, I am, as ever,

Your friend and ob't servant,

ROBERT W. LOWBER.

For value received, I hereby sell, assign and transfer to ——— ———, his heirs or assigns, all my right, title and interest in and to seven thousand and five hundred shares of the capital stock of the Minnesota and Northwestern Railroad Company, and all right, title, claims, interest and demand in and to said stock, and the rights or franchises of the charter of said Company.

In Witness Whereof, I have hereunto set my hand this 26th day of January, A. D. 1872.

ROBERT W. LOWBER.

DEFENDANT'S EXHIBIT 25.

For value received I hereby sell, assign and transfer to William R. Marshall, his heirs or assigns, all my right, title and interest in and to twelve hundred and fifty shares of the capital stock of the Minnesota and North Western Railroad Company, and all my right,
334 title and interest in and to all and any other shares of the said capital stock.

March 27, 1872.

JOHN M. BARBOUR.

DEFENDANT'S EXHIBIT 26.

CLEVELAND, O., *Aug.* 27, 1872.

1250 Shares.

For value received I hereby sell, assign and transfer to William R. Marshall, of Saint Paul, Minnesota, twelve hundred and fifty shares of the capital stock of the Minnesota and North Western Rail Road Company.

GEO. W. BILLINGS.

25 cent. Internal Revenue stamp.

DEFENDANT'S EXHIBIT 27.

For value received I hereby transfer to Gov. Wm. R. Marshall, three thousand five hundred shares of the stock of the Minnesota and North Western Railroad Company.

Witness my hand and seal the 30th day of April, 1872.

EDMUND RICE. [SEAL.]

25 cent Internal Revenue Stamp.

335 DEFENDANT'S EXHIBIT 28.

For value received I hereby sell, assign and transfer to John S. Kennedy, Esq., of New York, five thousand shares of the capital stock of the Minnesota & Northwestern Railroad Company, chartered by act of the Legislature of the Territory of Minnesota, approved March 4, 1854, and amended by subsequent acts. Said shares representing one-half of the capital stock of one million dollars of

said Company, and being part of the shares recently assigned to me by Hon. Jno. M. Barbour, of New York, Robt. W. Lowber of ——, Geo. W. Billings of Cleveland and Hon. Ed'd Rice of St. Paul.

Witness my hand and seal this 22nd day of November, 1872.

WM. R. MARSHALL. [SEAL.]

Witness:

E. G. WACHERHAGEN.

DEFENDANT'S EXHIBIT 29.

Know all men by these Presents, That I, John S. Kennedy, for value received, have bargained, sold, assigned and transferred, and by these presents do bargain, sell, assign and transfer, unto William R. Marshall, five thousand shares of the capital stock of the Minnesota & Northwestern Rail Road Company, chartered by act of the Legislature of the Territory of Minnesota, approved March 4th, 1854, and amended by subsequent acts, being the same stock
336 transferred to me by instrument dated November 22, '72, attached hereto, no certificate of same having been issued to me —— —— standing in — name on the books of the —— —— and do hereby constitute and point —— —— my true and lawful attorney, irrevocable for me and in my name and stead, but to use, to sell, assign, transfer and set over, all or any part of the said stock, and for that purpose, to make and execute all necessary acts of assignment and transfer, and one or more persons to substitute with like full power, hereby ratifying and confirming all that my said attorney or substitute or substitutes, shall lawfully do by virtue hereof.

In witness whereof, I have hereunto set my hand and seal the 21st day of March, one thousand eight hundred and eighty-three.

JOHN S. KENNEDY.

Sealed and delivered in the presence of

EDW. T. NICHOLS, JR.

DEFENDANT'S EXHIBIT 30.

Know all men by these Presents, that, I, James H. Donaldson, for value received, have bargained, sold, assigned and transferred, and by these presents do bargain, sell, assign and transfer unto Wm. R. Marshall, sixteen hundred sixty-six and two-thirds (1666-2 3) shares of the capital stock of the Minnesota &
337 Northwestern Railroad Company, chartered by act of the Legislature of the Territory of Minnesota, approved March 4th, 1854, (amended by subsequent acts of the Legislature of the Territory and State of Minnesota, the latest amendment being by the Legislature at its last session 1883). The shares of stock hereby sold and transferred being the same heretofore assigned to me by said Wm. R. Marshall and all the shares and the only shares ever

owned and held by me in said Minnesota and Northwestern Railroad Company.

And I do hereby covenant and agree with said Wm. M. Marshall that I am the true and lawful owner of said shares of stock and have good right to sell and transfer the same. And I do hereby constitute and appoint said Wm. R. Marshall, my true and lawful attorney, irrevocable for me and in my name and stead, but to his own use, to sell, assign, transfer and set over all or any part of said stock and for that purpose to make and execute all necessary acts of assignment and transfer, and one or more persons to substitute with like full power, hereby ratifying and confirming all that my said attorney or his substitute shall lawfully do by virtue hereof.

In witness whereof I have hereunto set my hand and seal this 23rd day of July, A. D. 1883.

JAMES H. DONALDSON. [SEAL.]

In presence of:
LA FAYETTE SHAW.

338 DEFENDANT'S EXHIBIT 31.

ST. PAUL, MINN., *March 27th*, 1883.

Know all men by these Presents, that, I, William R. Marshall, for value received ($13350.53) have bargained, sold, assigned and transferred, and by these presents do bargain, sell, assign and transfer, unto Benjamin S. Cook, two thousand five hundred shares (2,500) of the capital stock of the Minnesota & Northwestern Railroad Company, chartered by act of the Legislature of the Territory of Minnesota, approved March 4, 1854, and amended by subsequent acts (being one-half of five thousand shares of aforesaid stock assigned to me by John S. Kennedy of New York by instrument dated March 21, 1883). And I do hereby constitute and appoint said Benj. S. Cook my true and lawful attorney, irrevocable, for me and in my name and stead, but to his use, to sell, assign, transfer and set over, all or any part of the said stock, and for that purpose to make and execute all necessary acts of assignment and transfer, and one or more persons to substitute with like full power, hereby ratifying and confirming all that my said attorney or his substitute or substitutes, shall lawfully do by virtue hereof.

In witness whereof, I have hereunto set my hand and seal the 27th day of March, 1883.

WILLIAM R. MARSHALL. [SEAL.]

Sealed and delivered in presence of:
E. H. BAILEY,
WM. A. MILLER.

339 DEFENDANT'S EXHIBIT 32.

ST. PAUL, MINN., *November 22nd*, 1872.

For value received I hereby sell, assign and transfer to B. S. Cook of the village of Mantorville, Minnesota, sixteen hundred and sixty-six and two-thirds (1666-2/3) shares of the capital stock of the Min-

nesota and Northwestern Rail Road Company. (A company incorporated by act of the Legislature of Minnesota, approved March 4, 1854, and amended by subsequent act.) Said shares representing one-sixth of the capital stock of one million dollars of said Company and being the same recently transferred to me by Hon. Jno. M. Barbour and Robt. W. Lowber of New York, George W. Billings of Cleveland, Ohio, and Hon. Edmund Rice of Saint Paul, Minn.

Witness my hand and seal this 22nd day of November, A. D. 1872.

WM. R. MARSHALL.

Witness:

NORRIS T. LAYTON.

DEFENDANT'S EXHIBIT 33.

Know all men by these Presents that I, Benj. S. Cook, for value received, do hereby sell, assign and transfer to A. B. Stickney, of St. Paul, Minnesota, all my right, title and interest in and to forty-one hundred sixty-six and 2/3 shares of the Minnesota and Northwestern Railway Company, a corporation of the State
340 of Minnesota, and do hereby irrevocably constitute and appoint said A. B. Stickney my true and lawful attorney to transfer the said stock on the books of the above named Company with full power of substitution in the premises.

Dated December 26th, 1883.

B. S. COOK. [SEAL.]

In presence of:

WM. R. MARSHALL,
ROBT. C. WIGHT.

DEFENDANT'S EXHIBIT 34.

In consideration of five thousand dollars to me in hand paid by A. B. Stickney, of St. Paul, Minnesota, the receipt whereof is hereby acknowledged, I hereby sell, transfer and assign to A. B. Stickney, aforesaid, five thousand eight hundred and thirty-three and 1/3 shares of the capital stock of the Minnesota and North Western Railroad Company, a corporation of the State of Minnesota, it being all my interest in said corporation.

Witness my hand and seal this 28th day of December, 1883.

WM. R. MARSHALL. [SEAL.]

In presence of:

ROBT. C. WIGHT.

DEFENDANT'S EXHIBIT 35.

For value received I hereby sell, transfer and assign one share of stock of the Minnesota and North Western Railroad Company
341 to each of the following named persons, to-wit: John I. Thompson, Layfayette Shaw, Charles F. Hatch, N. P. Langford and W. A. Spencer.

Witness my hand and seal this 27th day of December, 1883.

A. B. STICKNEY. [SEAL.]

In presence of:

ROBT. C. WIGHT.

DEFENDANT'S EXHIBIT 36.

For value received I hereby sell, transfer and assign one share of stock of the Minnesota and North Western Railroad Company to each of the following named persons, to-wit: C. W. Benson, D. K. Dunlop, S. H. Graves, D. M. Sabin and C. F. Benson.

Witness my hand and seal this 27th day of December, 1883.

A. B. STICKNEY. [SEAL.]

In presence of:
ROBT. C. WIGHT.

DEFT'S EX. 38.

(NOTE: This exhibit was offered and accepted in lieu of Ex. 37.)

Stockholders' Meeting.

We, the undersigned, being all the stockholders of the Minnesota and Northwestern Railroad Company, a corporation created,
342 organized and existing under the laws of the Territory and State of Minnesota. Incorporated by an act entitled "An act to incorporate the Minnesota and Northwestern Railroad Company"—approved March 4th, 1854, and the several acts amendatory thereof, being all present at the office of A. B. Stickney in the City of St. Paul on this 27th day of December, 1883, do hereby consent and agree to hold a meeting of the stockholders of said Company for the purpose of electing a Board of Directors.

Wm. R. Marshall	Holder	of	5833 1/3	Shares
A. B. Stickney	"	"	4161 2/3	"
Wm. A. Spencer	"	"	1	"
N. P. Langford	"	"	1	"
La Fayette Shaw	"	"	1	"
Chas. F. Hatch	"	"	1	"
John I. Thompson	"	"	1	"
			10,000	Shares

A. B. Stickney filed a transfer of one share of stock to each of the following named persons:

C. W. Benson of Sibley, Iowa.
K. D. Dunlop of London, England.
S. H. Graves of Sibley, Iowa.
D. M. Sabin of Stillwater, Minn.
C. F. Benson of Sibley, Iowa.

Stockholders' Meeting.

Record of meeting of stockholders held at the office of A. B. Stickney in the City of St. Paul on this 27th day of December, 1883, pursuant to the above consent and agreement.

343 Present all the stockholders.

Upon motion of Chas. F. Hatch, seconded by A. B. Stickney, W. R. Marshall was elected Chairman and John I. Thompson Secretary pro tem.

Upon motion of A. B. Stickney, seconded by Chas. F. Hatch, LaFayette Shaw, Chas. F. Hatch and N. P. Langford were unanimously elected directors to serve for one year, and D. M. Sabin, residing at Stillwater, Minn., C. F. Benson of Sibley, Iowa, and W. A. Spencer of St. Paul, Minnesota, were unanimously elected directors to serve for two years, and W. R. Marshall of St. Paul, Minn., John I. Thompson of St. Paul, Minn., and A. B. Stickney of St. Paul, Minn., were unanimously elected directors to serve for three years, and C. W. Benson of Sibley, Iowa, S. H. Graves of Sibley, Iowa, and K. D. Dunlop of No. 4 Bishopsgate Street within London, E. C. England, were unanimously elected directors to serve for four years, and all until their successors are elected and qualified.

Upon motion of LaFayette Shaw, seconded by N. P. Langford, it was unanimously resolved that the Board of Directors may meet immediately and organize by electing officers and by adopting such by-laws as they may deem expedient for the government of this corporation, and may transact such other business as may be brought before them.

The stockholders then took a recess until after the meeting of the Board of Directors.

WM. R. MARSHALL, *Chairman.*
JOHN I. THOMPSON,
Secretary Pro Tem.

344 *Directors' Meeting.*

Present, W. R. Marshall, John I. Thompson, LaFayette Shaw, A. B. Stickney, Charles F. Hatch, N. P. Langford, S. H. Graves and W. A. Spencer.

Upon motion of W. R. Marshall, seconded by W. A. Spencer, A. B. Stickney was elected President by a unanimous vote of all the directors present, and upon motion of Charles F. Hatch, seconded by John I. Thompson, Mr. W. R. Marshall was elected Vice President of the Company by unanimous vote of all the directors present.

Upon motion of N. P. Langford, seconded by W. A. Spencer, John I. Thompson was elected Secretary and Treasurer of the Company by a unanimous vote of all the Directors present.

On motion of S. H. Graves, seconded by W. R. Marshall, the by-laws of the Company as recorded on pages 380, 381, 382, 383 and 384 of this record were adopted by a vote of all the directors present.

On motion of Chas. F. Hatch, seconded by N. P. Langford, the following named directors were elected members of the executive committee to serve for the next ensuing year: K. D. Dunlop, S. H. Graves, C. W. Benson, W. R. Marshall, John I. Thompson and the President ex officio.

On motion of Lafayette Shaw, seconded by Chas. F. Hatch, it was unanimously resolved that the salary of the Vice President and the Secretary and Treasurer be fixed at Twenty-five hundred dollars per annum for the year ending the 31st day of December, 1884, payable monthly, and that the salary of the President
345 until the further order of the Board be fixed at One Dollar per year.

On motion of W. R. Marshall, seconded by Chas. F. Hatch, it was further unanimously resolved, That the capital stock of this company shall be divided into two classes, Common and Preferred—two-fifths (2/5) of all stock at any time created, issued or outstanding shall be Preferred, and three-fifths (3/5) Common Stock. Second—that said Preferred Stock shall be entitled to a preference of seven per centum (non-cumulative) in the dividends declared in any year before any dividends are paid upon the common stock of the company, and after dividends shall be paid on the common stock to a like amount (seven per centum) for any year, then both common and preferred stock shall be entitled to equal rates per share in any further dividend for that year. Each share of preferred and each share of common stock shall be entitled to one vote at any and every meeting of the stockholders, and said shares of preferred stock shall, until the capital stock of said company be increased pursuant to the authority conferred by its charter, be limited in amount to four millions of dollars and may be issued in such form as the Board of Directors shall prescribe for the purpose of building, completing and equipping the Rail Road of this company or any part of the same.

(Then appears resolution and long contract relating to construction work, which is omitted from this copy.)

Whereupon the meeting adjourned until Monday, Decem-
346 ber 31st, 1883, at 10 o'clock A. M. at this place.

JOHN I. THOMPSON, *Secretary.*

Stockholders' Meeting.

The Directors' Meeting having adjourned, the stockholders reconvened. The President reported that the directors at their meeting had adopted a resolution in regard to dividing the capital stock of the company into two classes, to be known as common and preferred stock, of which the following is a copy:

"Resolved, that the capital stock of this company shall be divided into two classes, Common and Preferred as follows: Two-fifths of any stock at any time created, issued or outstanding shall be preferred, and three-fifths of any such stock so created, issued or outstanding shall be common stock.

Second. That said preferred stock shall be entitled to a preference of seven per centum (non-cumulative) in the dividends declared in any year before any dividends shall be paid on the common stock of the company, and after dividends shall have been paid on the common stock to a like amount (seven per centum) for any year, then both preferred and common stock shall be en-

titled to equal rates per share in any further dividends for that year. Each share of preferred and each share of common stock shall be entitled to one vote at any and every meeting of the stockholders, and said shares of preferred stock shall, until the
347 capital stock of this company be increased pursuant to the authority conferred by its charter, be limited in amount to four million dollars, and may be issued in such form as the Board of Directors shall prescribe for the purpose of building, completing and equipping the railroad of this company, or any part of the same.

Upon motion of Wm. R. Marshall, seconded by N. P. Langford, it was resolved that said resolution of t' rectors be and hereby is assented to by the stockholders of t' mpany. Said motion being put to a vote, the roll of the sto ders was called, and the following stockholders voted in the af tive:

Wm. R. Marshall	Votes	Yeas	5833⅓	Shares
A. B. Stickney	"	"	4156⅔	"
W. A. Spencer	"	"	1	"
N. P. Langford	"	"	1	"
La Fayette Shaw	"	"	1	"
Charles F. Hatch	"	"	1	"
John I. Thompson	"	"	1	"
S. H. Graves	"	"	1	"
			9996	"

Being more than two-thirds of the common capital stock now outstanding of this corporation, to-wit: all the said stock excepting four shares.

On motion of Charles F. Hatch, seconded by LaFayette Shaw, it was resolved by unanimous vote of all the stockholders present that the action of said Board of Directors at their said meeting as the same is recorded in this book, be and the same is in all
348 respects approved, ratified and confirmed.

And the roll of stockholders being called upon said motion, the following stock voted in the affirmative:

Wm. R. Marshall	Votes	Yeas	5833⅓	Shares
A. B. Stickney	"	"	4156⅔	"
W. A. Spencer	"	"	1	"
N. P. Langford	"	"	1	"
La Fayette Shaw	"	"	1	"
Charles F. Hatch	"	"	1	"
John I. Thompson	"	"	1	"
S. H. Graves	"	"	1	"

On motion of Wm. R. Marshall, seconded by N. P. Langford, it was resolved that the Directors of this company be and hereby are authorized to cause to be issued such bonds and to execute such mortgage or mortgages upon the property and franchises of this company as shall, or may be necessary to carry into effect the terms of the contract authorized at the meeting of the Board of Directors

this day held, and recorded in the minutes, of the agreement between this company and the Minnesota Loan and Debenture Company for the construction of said railroad, which motion being put to the meeting, was carried unanimously.

John I. Thompson moved the adoption of the following resolution:

Resolved, that a seal of circular form, bearing on the outer rim thereof the words "Minnesota and Northwestern Railroad Company" and in the center the words "Corporate Seal," be adopted as
349 the seal of this company, an impression of which is hereto affixed.

Which motion was seconded by Charles F. Hatch and unanimously carried.

Upon motion of A. B. Stickney, seconded by Charles F. Hatch, the meeting was adjourned until Monday, December 31st, 1883, at 10 A. M. at this place.

JOHN I. THOMPSON, *Secretary.*

Stockholder's Meeting.

Monday, December 31st, 1883.

Assignments of stocks filed as follows:

Lafayette Shaw to Wm. B. Close, one share.

W. A. Spencer to James B. Close, one share.

John I. Thompson to Morris Auerbach, one share.

Charles F. Hatch to Wm. Dawson, one share.

N. P. Langford to Wm. R. Merriam, one share.

Pursuant to adjournment the stockholders met at the office of A. B. Stickney in St. Paul, at 10 o'clock A. M.

Present, Wm. R. Marshall, owner and holder of 5833⅓ shares, and A. B. Stickney, owner and holder of 4156⅔ shares.

The resignation of La Fayette Shaw as director of this company was received, accepted and filed. And William B. Close of Number 4 Bishopsgate Street within London, England, was chosen a director to serve for one year to fill the vacancy.

350 The resignation of Charles F. Hatch as director of this company was received- accepted and filed. And William R. Merriam of St. Paul, Minnesota, was chosen a director to serve for one year to fill the vacancy.

The resignation of N. P. Langford as director of this company was received, accepted and filed. And William Dawson of St. Paul, Minnesota, was chosen a director to serve for one year, to fill the vacancy.

The resignation of W. A. Spencer as director of this company was received, accepted and filed. And J. B. Close of Sibley, Iowa, was chosen a director to serve for two years to fill the vacancy.

The resignation of John I. Thompson as director of this company was received, accepted and filed. And Morris Auerbach of St. Paul, Minnesota, was chosen a director to serve for three years to fill the vacancy.

On motion the stockholders' meeting was adjourned, sine die.

JOHN I. THOMPSON, *Secretary.*

Directors' Meeting.

Monday, December 31st, 1883.

The Board of Directors met pursuant to adjournment.

Present: Wm. R. Marshall, A. B. Stickney, Wm. Dawson, Wm. R. Merriam, D. M. Sabin, Maurice Auerbach and S. H. Graves.

Wm. R. Marshall offered the following resolution:

351 Whereas, The resignation of John I. Thompson as a director in this company has created a vacancy in the executive committee.

Therefore, be it resolved that James B. Close be elected to serve as a member of the executive committee to fill the vacancy.

Which resolution was unanimously carried.

On motion the Board adjourned sine die.

JOHN I. THOMPSON, *Secretary.*

Directors' Meeting.

Monday, June 30th, 1884.

Proceedings of a meeting of the Board of Directors held at the office of A. B. Stickney in the City of St. Paul, A. B. Stickney presiding.

Present: A. B. Stickney, Wm. R. Marshall, Wm. Dawson, Wm. R. Merriam, D. M. Sabin, Maurice Auerbach, C. F. Benson and D. K. Dunlop.

S. H. Graves, James B. Close and Wm. B. Close having tendered their resignations as directors in writing, Mr. Sabin moved that the resignation of said S. H. Graves, James B. Close and Wm. B. Close be accepted.

Which motion was seconded by Wm. R. Merriam and unanimously adopted.

Copy of Notice to Directors.

ST. PAUL, MINN., *Sept. 13th*, 1884.

DEAR SIR: By order of the President there will be a meeting of the Board of Directors of the Minnesota and Northwestern Railroad Company, held at the office of the President (26 Gilfillan

352 Block, St. Paul) on Friday, September 19th, 1884, at 2 o'clock P. M.

Your attendance is respectfully requested.

Yours truly, JOHN I. THOMPSON, *Secretary.*

Directors' Meeting.

Pursuant to above notice the Board of Directors met at the office of the President on Friday, September 15th, 1884, at 2 P. M.

There were present A. B. Stickney, C. W. Benson, C. F. Benson, Wm. Dawson, K. D. Dunlop, M. Auberbach, W. R. Marshall.

(Then follows resolutions relating to form of preferred and common stock certificates, together with the appointment of an agent of the Minnesota and Northwestern Railroad Company in New York City for the purpose of countersigning and registering all issues of stock and transfers thereof.)

Mr. C. F. Benson offered and moved the adoption of the following resolution:

Resolved—Whereas on the 28th day of December, 1883, a contract was entered into between the Company and the Minnesota Loan and Debenture Company, a corporation of the State of Minnesota, which contract is recorded in full on pages 5, 6, 7, 8, 9, 10 and 11 of the records of this Company, whereby in consideration of the said Minnesota Loan and Debenture Company furnishing material and constructing certain portions of the railroad for the Com-
353 pany, the Company in part consideration thereof agreed to deliver to said Minnesota Loan and Debenture Company the common stock of this Company to the extent of fifteen thousand dollars per mile, and the preferred stock to the extent of ten thousand dollars per mile, to be delivered as often as ten miles of said line shall be fully graded and bridged and made ready for the ties.

And Whereas said Minnesota Loan and Debenture Company is now engaged in constructing a section of one hundred and ten miles of said road extending from St. Paul to the North line of the State of Iowa, at or near Mona, in Iowa, a distance of 110 miles, and has the same partially graded and has purchased in addition thereto all the steel rail for said section of one hundred and ten miles, and a large proportion of the same has been delivered to this company and paid for by said Minnesota Loan and Debenture Company.

And Whereas said Minnesota Loan and Debenture Company has requested that said common and preferred stock for the full one hundred and ten (110) miles of road, to wit: $1,650,000 par value of common stock and $1,100,000 par value of preferred stock be now issued to them in part payment under the terms of said contract.

Now Therefore, be is resolved that the President and Treasurer of this Company be and hereby are authorized and directed to issue to and deliver at once to said Minnesota Loan and Debenture Company or to such person or persons or corporation as they may desig-
nate, full paid common stock of this company to the extent
354 of $1,650,000 par value, and full paid preferred stock to the extent of $1,100,000 par value, and take the receipt of said Minnesota Loan and Debenture Company for the same in part payment to it for the work and material furnished and to be furnished under the terms of said contract in the construction of said one hundred and ten miles of railway.

And Whereas on and for a long time prior to the 26th day of December, 1883, there were 4166 2/3 shares of stock of this Company outstanding in the name of Benjamin S. Cook, and 5833 1/3 shares of stock outstanding in the name of William R. Marshall, which was all the stock outstanding at that time, making in all ten thousand shares of full paid common stock.

And Whereas all of said stock has been purchased by A. B. Stick-

ney, for which the said A. B. Stickney has paid the sum of Eight Thousand Five Hundred Seventy-one Dollars.

Now Therefore be it resolved that the Treasurer of this Company be and hereby is directed to procure said million dollars of full paid common stock to be transferred by said A. B. Stickney to the Minnesota Loan and Debenture Company and accepted by said Minnesota Loan and Debenture Company as a part of the One Million Six Hundred and Fifty Thousand Dollars of common stock now due the said Minnesota Loan and Debenture Company under said contract, and upon said Stickney's transferring said stock to the Minnesota Loan and Debenture Company according to the terms of this resolution to reimburse the said Stickney the amount which he paid therefor, to-wit: Eight Thousand Five Hundred and Seventy-one dollars ($8,571.00).

Seconded by Mr. Dunlop and unanimously adopted.

Mr. Auerbach offered the following resolution, and moved its adoption:

Whereas this Company in addition to its railroad which it is specially empowered by its charter to construct, maintain and operate, to-wit: from such point on the northern boundary of the State of Iowa as its Board of Directors shall designate by way of the Cities of St. Paul and Minneapolis, to the northern boundary of the State of Minnesota, proposes to acquire by contract or agreement for a connection or by lease or purchase or consolidation, or in such manner as it is or may be authorized by its charter or General Laws of the State of Minnesota, or of any State or Territory of the United States through or into which any railroad built, owned or acquired by it may extend, and to operate a railroad extending from the Southern terminus of the line of railroad authorized by its charter as aforesaid at the southern boundary of the State of Minnesota into or across the State of Iowa, and then easterly across the State of Illinois, and to acquire by agreement, consolidation, lease or purchase or in such manner as is authorized by said state and to control and operate lines of railroad which are or may be continuous with the line or lines of such railroad company or connected with them or either of them in the states through which they may be built and proposes to acquire, by purchase or otherwise, such other railways in the States of Minnesota, Iowa, Wisconsin and the Territory of Dakota or other states or territories as shall, in the judgment of its Board of Directors or of the Executive Committee from time to time be deemed essential feeders and connections of this Company's railroads or any thereof, to construct on said lines bridges over the Mississippi River wherever said line or lines shall cross the same and also over the Missouri River in the State or Territory of Dakota or elsewhere, and to provide the means of securing ample equipment for said lines to meet the requirements of future business.

And Whereas, it is deemed by the said Company and its Board of Directors necessary and expedient to exercise the borrowing powers conferred upon this company by its charter and the general statutes of the state of Minnesota, for the purpose of borrowing money to be expended in the construction and equipment of said

road and branches and the bridges and appendages thereto and of aiding in the construction, or purchasing, or constructing or leasing, or consolidating with any other railroad or railroads, branch or otherwise, and the franchises and properties thereof within or without the state of Minnesota, and of purchasing by way of exchange or otherwise the bonds or other securities of any railroad or railroads within or without the State of Minnesota, which this Company may now or hereafter have the lawful right and power
357 to purchase, own, lease, aid or consolidate with.

Now Therefore, be it Resolved, by the Board of Directors of this Company that for the purpose aforesaid the President and Secretary of this Company be and they are hereby authorized and directed to execute in the corporate name of this company and issue from time to time as the Board of Directors of this Company may direct, the bonds of the Company to be designated first mortgage five per cent gold bonds, at the rate of sixteen thousand dollars per mile of said road actually completed, and in operation, and an additional amount, not exceeding four thousand dollars per mile for payment of right of way and depot grounds and terminal facilities in St. Paul and Minneapolis or any other city having over fifty thousand population, and bridges across the Mississippi and Missouri Rivers, and an additional amount, not exceeding eight thousand dollars per mile for the purpose of building a double track upon said road or any portion thereof and to be limited to eight thousand dollars per mile of double track actually constructed and in operation, which bonds may be in substantially the following form:

(Then follows a form of the bond, trustees certificate and form of coupon identical with the forms appearing in the mortgage, copy of which is attached and marked "Exhibit —.") And shall be issued in sums of $1,000.00 each, payable to the Metropolitan Trust Company of the City of New York, and Robert H. Benson of
358 London, England, or bearer, in United States Gold Coin of the present standard on the first day of July, one thousand nine hundred and thirty-four at the office or agency of said Railroad Company in the City of New York, or at the option of the holder at the office or agency of the Company in London, England, at the fixed rate of four shillings and one and one-half pence per dollar, with interest thereon in the meantime in like gold coin at the rate of five per centum per annum payable semi-annually on the first day of January and July of each year at said office or agency upon presentation and surrender of the coupons annexed to said bonds as they severally fall due. And said bonds shall contain a provision providing that in case of default in the payment of any half yearly installment of interest which shall have become due and been demanded pursuant to the terms of said bonds, and the continuance of such default for the period of six months after the maturity of such installment, the principal of said bond shall become due in the manner and subject to the conditions to be provided in the mortgage to be executed to secure said bonds. And the President and Secretary of this Company are hereby authorized

and directed for the purpose of securing the payment of said bonds to execute in its corporate name, and deliver to the Metropolitan Trust Company of the City of New York and Robert H. Benson of London, England, as Trustees for the holders of said bonds, a mortgage and deed of trust bearing date the first day of July,
359 1884, conveying by way of mortgage or deed of trust the railway of this company constructed and to be constructed in the State of Minnesota, and all railroads owned by this company or which may be acquired or created within or without the State of Minnesota by purchase, construction, consolidation or otherwise, and generally the property of the railroad Company within or without the State of Minnesota acquired and to be acquired, real, personal or mixed, and in expectancy, including the corporate and other franchises of said Railroad Company. The following form or mortgage is adopted and approved and said President and Secretary are authorized to execute the same in the corporate name of this company upon the property, to the persons and for the purposes hereinbefore named.

(Then follows in said resolution a copy of the mortgage which is hereto attached and marked Exhibit —.)

(Then follows resolution appointing a registrar agency at London, England, for purpose of registering the transfers of all bonds issued by the company pursuant to said mortgage; also resolution relating to deed for certain lands in Mower County.)

Mr. Auerbach offered the following resolution and moved its adoption:

Resolved, That C. W. Benson be and hereby is elected the Treasurer of this Company to fill the vacancy occasioned by the resignation of John I. Thompson, and that the name of C. W. Benson be inserted in the first mortgage five per cent gold bond of this
360 company authorized to be issued this day, as the Treasurer whose engraved signature is to authenticate the coupons attached to said bonds.

Seconded by W. R. Marshall and unanimously adopted.

Mr. Stickney nominated Ansel Oppenheim as a director to fill the vacancy occasioned by the resignation of S. H. Graves, and Wm. Louis Boyle as a director to fill the vacancy occasioned by the resignation of William B. Close.

Said names were seconded by Mr. C. W. Benson and without being put to a vote were laid over until the next meeting of the Directors as required by the charter and by-laws of the Company.

Whereupon on motion, duly seconded, the meeting adjourned without day.

JOHN I. THOMPSON, *Secretary.*

(Title of Cause.)

Findings of Fact, Conclusions of Law and Order for Judgment.

This case came regularly on for trial before the Court without a jury; Royal A. Stone and George W. Peterson, Assistant Attorney General, appearing as attorneys for the plaintiff, and Davis, Kel-

logg & Severance, attorneys of record, and Asa G. Briggs, as attorney for the defendant.

After hearing the evidence and the arguments of counsel
361 and upon said evidence and the stipulations of the parties the Court finds as facts:

That during the year 1892 the defendant was organized and created as a railroad corporation under and by virtue of the laws of the state of Illinois and ever since such time has been and now is a railroad corporation.

That ever since the 7th day of December, 1893, the defendant has been and now is the owner and in control of a line of railway, running from the city of St. Paul in the state of Minnesota, southward to and beyond the state line between Minnesota and Iowa. That during all said times the defendant has been, and now is, operating said line of railway, in the usual manner, as a common carrier of freight and passengers.

That prior to said 7th day of December, 1893, said defendant fully complied with all of the requirements of the laws of the state of Minnesota relating to foreign railroad corporations doing business and owning and operating lines of railroad within this state and during all times since said date it has been and is now authorized to purchase, own, hold and operate railroads and railroad property within said state of Minnesota, and in accordance with the laws thereof.

That the Minnesota & Northwestern Railroad Company was duly organized and created as a railroad corporation under and by special act of the territorial legislature of the Territory of Minneapolis, approved March 4, 1854, entitled "An Act to Incorporate the
362 Minnesota & Northwestern Railroad Company," and by said act was duly authorized to construct, equip and operate a railroad from Lake Superior to the southern boundary of Minnesota by way of St. Paul, (Chap. 47, Laws of 1854). That said act contained a provision fixing a time limit for the completion of said railroad and provided for forfeiture by said company of all its rights in case of non-compliance therewith.

That on the 16th day of February, 1855, the territorial legislature of the Territory of Minnesota duly passed an act entitled "A bill to amend an act entitled 'An Act to incorporate the Minnesota and Northwestern Railroad Company,'" which was approved on the 17th day of February, 1855. (Chap. 58, Laws of 1855.) That said act contained a provision fixing a time limit for the completion of said road, and provided for forfeiture by said company of all its rights in case of non-compliance therewith. That said act also contained the following:

"Legislature of the Territory or future state of Minnesota may repeal, amend or modify this act and the act to which this is amendatory, from and after the expiration of twenty years from the date of the passage of this act. Provided that compensation be made to said company for all damages sustained thereby."

That on the 21st day of February, 1855, the legislature of the Territory of Minnesota passed an act entitled "A bill supplementary

to an act entitled 'An Act to amend the Minnesota & Northwestern Railroad Company,'" which was approved on said 21st day
363 of February, 1855, (Chap. 52, Laws of 1855).

That in 1855 said Legislature also passed an act which was duly approved by the Governor of said territory, entitled "An act supplementary to an act entitled 'An act to amend the Minnesota & Northwestern Railroad Company.'" (Chap. 20, Laws of 1855.)

That on the 1st day of March, 1856, the legislature of the territory of Minnesota duly amended the charter of the Minnesota & Northwestern Railroad Company by an act entitled "An Act Granting an Extension of Time to the Minnesota & Northwestern Railroad Company and for Other Purposes," approved March 1, 1856.

That by Section 1 of said act it was provided:

"That this extension of time to the Minnesota & Northwestern Railroad Company, and all their rights, franchises and privileges under their charter shall be null and void, and the Governor of said Territory shall by proclamation to be published in some newspaper in St. Paul and in the city of New York, so declare as notice to all concerned, upon the failure of said company to comply with the following condition, which is, that said Minnesota & Northwestern Railroad Company shall, on or before the fourth day of July, 1856, notify the Governor of this territory in writing, to be signed by the president and secretary, or the acting president and acting secretary of said company, that they have and do accept fully the provisions of this act as a part of their original charter,
364 as approved by the Governor of this Territory on the fourth day of March, 1854, and with a certificate that the said acceptance is in obedience to directions previously given by the board of directors."

That by Section 2 of said act it is provided as follows:

"In consideration of the grant of lands contemplated in the 8th section of the Charter to said Company, approved March 4th, 1854, and of the extension of time to said Company as herein stated, and in further consideration of the restoration of all rights, powers and franchises to said company which may be supposed to have for any cause become forfeited to the Territory of Minnesota, said corporation binds and obliges itself to pay or cause to be paid to the Territory or future State of Minnesota, two per cent. upon each dollar of the gross receipts, proceeds and income of said Railroad, so far as the same may be received or due them on that part of said road lying within the limits of the Territory or future State of Minnesota, to be paid to the Treasurer of said Territory or future state, annually, on the first day of January in each year, from and after the day when the cars shall commence running on any part of said road in said Territory or future State of Minnesota, and which proceeds shall be appropriated to the payment of the Territorial or State government expenses, and such payments shall be in lieu of and the said Company shall be exempt from the payments of any other imposts, taxes or dividends, any law to the contrary notwithstanding."

365 That said act further provided that said road should be fully completed and put in operation on or before February

17th, 1863, but contained no provision for forfeiture for default in this particular.

That each and all of said acts were duly accepted by said Minnesota & Northwestern Railroad Company within the times and in the manner provided by said acts respectively.

That thereafter the legislature of the state of Minnesota duly passed an act entitled "An Act to Relieve the Minnesota & Northwestern Railroad Company" which was approved August 10, 1858. That the first two provisos of said act were never complied with by said Minnesota & Northwestern Railroad Company.

That thereafter the legislature of the State of Minnesota duly passed an act entitled "An Act to Amend the Charter of the Minnesota & Northwestern Railroad Company," approved February 26, 1872. That said act provided that the name of said corporation might be changed by resolution of the board of directors to the name of the St. Paul & Iowa Railroad Company, or such other name as said board of directors should select.

That thereafter the legislature of the state of Minnesota duly passed an act entitled "An Act to Amend the Charter of the Minnesota & Northwestern Railroad Company," duly approved March 6, 1883, to which reference is hereby made for greater certainty. That said act provided among other things that said Minnesota &
366 Northwestern Railroad Company was thereby authorized to consolidate its stock, franchises, rights and property with that of any other company which should undertake the construction and operation of the said railroad, and further authorized certain changes in the location of said road.

That the Minnesota & Northwestern Railroad Company duly constructed and put in operation the line of railroad first above mentioned from St. Paul, Minnesota, to the south line of said state and that the same was fully completed and opened for traffic on or about the 24th day of July, 1885.

That thereafter and until the 8th day of December, 1887, the same was duly operated by said Minnesota & Northwestern Railroad Company as a railroad.

That no governor of the territory of Minnesota, nor any governor of the state of Minnesota has at any time by executive proclamation or otherwise declared a forfeiture of any of the rights or franchises of the Minnesota & Northwestern Railroad Company granted by any of the legislative acts aforesaid, and that no legislature of the territory of Minnesota or of the state of Minnesota has at any time by act, resolution, or otherwise, enacted or declared the forfeiture of any rights or franchises; that no action, or proceeding of any nature has at any time been brought in any court of the territory or state of Minnesota or of the United States either by the territory or state of Minnesota or any official thereof or any person whatsoever
367 for the purpose of procuring a decree or judgment decreeing or declaring any such forfeiture, nor has any such judgment at any time been entered or obtained.

That on said 8th day of December, 1887, said Minnesota & Northwestern Railroad Company owned said line of road and also a line of railway from the south line of the state of Minnesota through

Oelwein in the state of Iowa, to Dubuque in the state of Iowa; that a corporation of the same name duly organized under the laws of the state of Illinois, then owned a line of railway from Dubuque to Chicago, in the state of Illinois, which latter corporation duly conveyed the same to the said Minnesota & Northwestern Railroad Company of Minnesota by lease dated December 27, 1886. That on the 8th day of December, 1887, said Chicago, St. Paul & Kansas City Railway Company owned a line of railway extending from Oelwein to the city of Des Moines in the state of Iowa, together with certain branch lines and was engaged in the construction of an extension of said line, from the city of Des Moines to the city of St. Joseph, in the state of Missouri.

That on the 8th day of December, 1887, with the concurrence and approval of three-fourths of the stockholders of the Minnesota & Northwestern Railroad Company of Minnesota and of the Chicago, St. Paul & Kansas City Railway Company, a contract was made and executed by said railway companies, a copy of which is attached to the answer herein and marked Exhibit A.

368 That under and pursuant to said contract Ex. A and on the 8th day of December, 1887, a deed was made from said Minnesota & Northwestern Railroad Company to the Chicago, St. Paul & Kansas City Railway Company, a copy of which is attached to the answer herein and marked Exhibit B.

That in and by said acts and proceedings said Minnesota & Northwestern Railroad Company consolidated its stock, franchises, rights and property with that of the Chicago, St. Paul & Kansas City Railway Company and transferred to said Chicago, St. Paul & Kansas City Railway Company all its "contracts, rights, privileges and immunities * * * and generally all its property, real, personal and mixed * * * and all appurtenances thereto.

That thereafter the Chicago, St. Paul & Kansas City Railway Company completed its line of railway to the city of St. Joseph, Missouri, and the city of Kansas City, Missouri, and thereupon operated said consolidated lines including the line of road in this state first above mentioned and until the consolidation with the Chicago, Great Western Railway Company hereinafter mentioned.

That Section 2036 of the Code of Iowa for 1897, which section was duly passed by the legislature of said state in the year 1873 and duly approved by the governor of said state and which has been the law of said state ever since, provides as follows: "Any such corporation (meaning any corporation organized under the laws of this state for the purpose of constructing and operating a railway)

369 may join interest and unite its railway with that of any other corporation at such point upon the boundary line of this state as may be agreed upon, and with the consent of three-fourths in interest of all the stockholders by purchase, sale or otherwise, may merge and consolidate the stock, property, franchises and liabilities of such corporations, making the same one corporation upon such terms as may be agreed upon not in conflict with the law."

That the agreement and consolidation and transfer above mentioned were not in conflict with any law of the state of Iowa, but that

the same were made in all things in accordance with and were duly authorized by, the laws of the states of Iowa and Minnesota.

That said Chicago, St. Paul & Kansas City Railway Company was duly organized and created as a railroad corporation under and by virtue of the laws of the state of Iowa, in the year 1886. That thereupon said Chicago, St. Paul & Kansas City Railway Company duly complied with all of the laws of the state of Minnesota relating to foreign railroad corporations doing business in this state and during all the times above mentioned was duly authorized and empowered to acquire by purchase or consolidation and to hold, own and operate railroads and railroad property within the state of Minnesota in accordance with the laws thereof.

That in the year 1885 the legislature of the state of Illinois duly passed the act set forth in full in the answer herein, which act was duly approved by the governor of said state. That said act
370 has ever since been and now is in full force and effect in said state.

That in 1892 all of the lines and property of the said Chicago, St. Paul & Kansas City Railway Company, including the line in Minnesota first above mentioned, were covered by mortgages or deeds of trust, to secure the payment of certain bonds. That each of said mortgages provided that in the event of default in payment of principal or interest upon said bonds a majority in interest of the holders of said bonds should have the right to agree upon a plan for the reorganization of said road. That thereafter and in the year 1892 said Chicago, St. Paul & Kansas City Railway Company became financial-y involved and it became apparent that it would not be in a position to meet the interest coupons upon said bonds maturing January 1st, 1893, and it so represented to said bondholders; that thereupon a committee of said bondholders was appointed to consider the position of said railway company and to take steps with the object of permanently placing the credit of the concern upon a sound basis. That thereafter said committee reported, that in order to avoid a receivership a reorganization of said company appeared to be imperative; that such reorganization should provide for cash for necessary capital expenditures so that the net earnings of said company should be available for interest and dividends; and that the control of the finances of said reorganized railroad should be assured to the present first mortgage bond-
371 holders and their representatives and such a reorganization was effected. That for the purpose of effecting such a reorganization, the Chicago, Great Western Railway Company was organized as aforesaid, and a lease of all the lines of road of said Chicago, St. Paul & Kansas City Railway Company was duly made to the said Chicago, Great Western Company, a copy of which lease is attached to the answer herein and marked Exhibit C.

That thereafter, and as part of the plan of such reorganization and on the 7th day of September, 1893, said Chicago, St. Paul & Kansas City Railway Company duly executed and delivered to said Chicago, Great Western Railway Company a deed of all the lines of railroad including the line of road in Minnesota first above mentioned.

That in and by the negotiations had as a part of said reorganization, it was agreed that stockholders in said Chicago, St. Paul & Kansas City Railway Company should exchange their stock in said company for common stock in the Chicago, Great Western Railway Company, and said stock was so exchanged; that the Chicago, Great Western Railway Company should assume, and it did assume, all obligations of the Chicago, St. Paul and Kansas City Railway Company, ranking prior to its first mortgage bonds. That said first mortgage bonds should be exchanged for debenture stock and preferred A stock in the Chicago, Great Western Railway Company, and they were so exchanged. That a trust deed should be given to secure the payment of interest on said debenture stock and
372 dividends on said preferred stock, and it was so given. That a committee of the holders of said debenture stock and preferred A stock should exercise general supervision and control of the finances of the reorganized company.

That the deed aforesaid recited the reorganization and the facts aforesaid and the legal authority of the Chicago, St. Paul & Kansas City Railway Company to make the same and of the Chicago, Great Western Railway Company to accept the same, and it transferred to the Chicago, Great Western Railway Company, the railroad of the Chicago, St. Paul & Kansas City Railway Company, "together with all its franchises * * * leases, contracts, rights, privileges and immunities and generally all its property, real, personal and mixed * * * and all appurtenances thereto." That said lease and deed, and all of said reorganization proceedings were duly authorized by the boards of directors and the stockholders of both said corporations.

That all of the instruments aforesaid were made and executed in conformity with the laws of the states of Minnesota, Iowa and Illinois and were authorized by and under the laws of said states.

That during the years 1885, 1886 and 1887, the Minnesota & Northwestern Railroad Company duly reported to the Railroad & Warehouse Commission of the state of Minnesota its gross earnings upon the line of road first above mentioned for each of said years and the Railroad & Warehouse Commission duly certified in
373 each year to the state auditor, that such report was made in said year and filed in their office according to law, and that the tax upon the said gross earnings was two per centum and said commission in each case certified to the exact amount of said tax, and the respective amounts so certified were duly paid by the Minnesota & Northwestern Railroad Company to the state of Minnesota and the same were duly accepted by the treasurer of said state. Said amounts were received without objection and without any claim that the amount of said taxes should have been computed at any higher or different rate or on any other basis than two per centum on said gross earnings.

That during the years 1888, 1889, 1890 and 1891, the Chicago, St. Paul & Kansas City Railway Company duly reported to said Railroad & Warehouse Commission its gross earnings upon the line of road above mentioned for each of said years, and said Railroad

& Warehouse Commission duly certified in each of said years to the state auditor, that such report was made and filed in their office according to law, and that the tax upon the said gross earnings was two per centum and said commission in each case certified to the exact amount of such tax, and the respective amounts so certified were duly paid by the Chicago, St. Paul & Kansas City Railway Company to the state of Minnesota and the same were duly accepted by the treasurer of said state. Said amounts were received without objection and without any claim that the amount of said tax
374 should have been computed at any higher or different rate or on any other basis than said two per centum on said gross earnings.

That during the years 1892 to 1904, both inclusive, the Chicago, Great Western Railway Company duly reported to said Railroad & Warehouse Commission its gross earnings upon the line of road first above mentioned for each of said years, and the said Railroad & Warehouse Commission duly certified in each of said years to the state auditor, that such report was made and filed in their office according to law, and that the tax upon the said gross earnings was two per centum, and said commission in each case certified to the exact amount of such tax, and the respective amounts so certified were duly paid by the Chicago, Great Western Railway Company to the state of Minnesota, and the same was duly accepted by the treasurer of said state. That said amounts were received without objection and without any claim that the amount of said tax should have been computed at any higher or different rate or on any other basis than said two per centum on said gross earnings.

That no objection was made by or on behalf of the state of Minnesota to the payment by any of the said companies of the two per cent gross earnings tax until the year 1905, when a four per cent tax was demanded; except that in the year 1897 the question whether said tax should be computed at the rate of two per cent or at the rate of three per cent was submitted to the Railroad & Warehouse Commission and said Railroad & Warehouse Commission de-
375 termined that said tax should be computed at two per centum.

That the gross earnings of the defendant for the year 1905 upon said single line of road first above mentioned running from St. Paul southward to the state line between Minnesota and Iowa were the sum of $1,248,980.93 in the state of Minnesota. That the defendant paid as a gross earnings tax thereon and the treasurer of said state accepted the sum of $24,979.62.

As Conclusions of Law.

The Court finds that the defendant is entitled to judgment:

That the Act of March 1, 1856, aforesaid, constituted a valid contract between the territory of Minnesota and said Minnesota & Northwestern Railroad Company, fixing the rate of taxation to be paid by said company.

That said contract rights were never forfeited or lost by said Minnesota & Northwestern Railroad Company.

That said contract right was transferred to and passed to said Chicago, St. Paul & Kansas City Railway Company and from said Company to the defendant by virtue of the acts and instrument aforesaid.

That the plaintiff take nothing by this action.

Let judgment be entered accordingly.

Dated at St. Paul, Minnesota, May —, 1908.

OSCAR HALLAM,
District Judge.

376 *Memorandum.*

The defendant owns, among other lines of railway, a single line running from St. Paul southward to the Iowa state line. This was the original line of the Minnesota and Northwestern Railroad Company within this state. This action involves the rate of taxation upon this line of road. Defendant contends that the rate is limited by contract to two per cent of its gross earnings; the state claims the right to exact four per cent of the gross earnings under the general laws of the state. The rate of taxation upon branch or subsidiary lines of defendant is not here involved.

The facts are in brief as follows:

The Minnesota & Northwestern Railroad Company was incorporated by a special act of the territorial legislature March 4, 1854, (Chap. 47, Special Laws of 1854). By said act it was authorized to construct a road from Lake Superior to the Iowa line, by way of St. Paul. Several amendatory acts were passed in 1855, among them Chap. 58, Special Laws 1855, which reserved the right to repeal, amend or modify this act and the act of which it was amendatory, after twenty years, provided compensation be made to said company for all damages sustained thereby. The foregoing acts fixed a time limit for the completion of said road and provided for forfeiture of all rights in case of default.

On March 1, 1856, the territorial legislature passed an act
377 granting an extension of time for the completion of the road (Chap. 47, Laws 1856). In this act it was provided that the lines should be completed by 1863, but no forfeiture was provided in case of default. This act further provided that the corporation binds itself, for a consideration, to pay, to the territory or future state, two per cent of its gross receipts and income and "that such payments shall be in lieu of, and the said company shall be exempt from, the payments of any other imposts, taxes or dividends, any law to the contrary notwithstanding." This act, by its terms, required acceptance by the railroad company. The formal acceptance of the act has not been produced but its due acceptance has been sufficiently proven.

The state constitution, adopted in 1858, did not permit the enactment of state laws providing for gross earnings taxation. By an amendment adopted in 1871, this form of taxation was authorized, subject to right of modification or repeal.

In 1872, the state legislature authorized the company to change its name to the St. Paul & Iowa Railroad Company or such other

name as the board of directors should select. (Chap. 102, Laws 1872.)

In 1883 the legislature amended the charter of the company by authorizing it to consolidate with any other railroad company and also to change the location of its line. (Chap. 83, Laws 1883.)

The road from St. Paul to the state line was completed July
378 24th, 1885. In 1887 the Minnesota & Northwestern Railroad Company consolidated with the Chicago, St. Paul & Kansas City Railway Company, an Iowa corporation, and transferred to said company its road and all its transferable rights. This company was reorganized in 1893 as the Chicago, Great Western Railway Company, a corporation under the laws of Illinois, and the road and all transferable rights were accordingly transferred to the new company.

These companies have successively paid the two per cent gross earnings tax provided by the act of 1856, from the time of the completion of the road to and including the year 1905. The state has never claimed the right to tax the road in any other manner and never claimed the right to any larger percentage of tax until after the passage of Chap. 253, general laws of 1903 and the approval thereof by the electors of this state.

The main questions here involved are: Did the act of 1856, above mentioned, constitute a contract between the state and the Minnesota & Northwestern Railroad Company, fixing its taxation at two per cent upon its gross earnings; if so, was this contract right ever lost or forfeited; and if not did it pass to the Kansas City Company and to the Great Western Company? I regard these questions as well settled by judicial decisions.

1. It was within the power of the territorial legislature to make a valid contract with this corporation which should irrevocably limit the power of taxation by future legislatures of the terri-
379 tory or state. Under repeated decisions of the Supreme Court of the United States and the supreme court of the state of Minnesota, this is no longer open to question. (First Division St. Paul & Pacific Railroad Company v. Parcher, 14 Minn., 297; County of Traverse v. Railway Co., 73 Minn., 417; Powers v. Railway Company, 201 U. S. 543, 556).

2. The territorial legislature by the act of 1856 did make such a contract. The language of that act is that the payment of "two per cent upon each dollar of the gross receipts, proceeds and income of said railroad * * * shall be in lieu of and the said company shall be exempt from the payment of any other imposts, taxes or dividends, any law to the contrary notwithstanding.

The meaning of this language is plain. Similar provisions have, in this state, been held to create a "contract right" "binding upon the future state" (First Division v. Parcher, 14 Minn. 297); "a contract right which the state alone had not the power to impair" (County of Stevens v. Ry. Co., 36 Minn. 467); to charge the grant "with the perpetual burden of the annual payment therein provided" (C. M. & St. P. Ry. Co. v. Pfaender, 23 Minn. 217); and to make

the property of the company "forever exempt" from other taxation (State v. N. P. Ry. Co., 32 Minn. 294).

It has been repeatedly held by the Supreme Court of the United States that language substantially the same as this, disables
380 the state from imposing any "higher rate of taxation."

Jefferson Branch Bank v. Skelly, 1 Black 346, 450.
State Bank v. Knoop, 16 How. 369.
Dodge v. Woolsey, 18 How. 331, 360.
New Jersey v. Yarl, 95 U. S. 104, 116.
Farrington v. Tennessee, 95 U. S. 679, 690.
Bank v. Tennessee, 161 U. S. 134.
Powers v. Railway Co., 201 U. S. 543, 559.

The cases where this question has arisen, have, for the most part, been cases where the attempted increase was by imposing some other form of taxation. But the principle is the same here. If the state cannot impose a "higher rate of taxation" it can no more impose a higher percentage than some other form of taxation. The plain meaning of the language of this act is that the tax upon gross earnings should not merely be in lieu of other forms of taxation, but that a tax of two per cent upon gross earnings should be in lieu of, and should exempt the company from other or higher taxation whether in some other form or at some other rate, which any law to the contrary might provide.

There was a contract entered into by affirmative action on both sides. The legislature passed it and the company accepted it, as, by the terms of the act, it was required to do. It was not intended that only one party should be bound (New Jersey v. Yarl, 95 U. S. 104, 116).

381 It is urged that Sec. 9, Chap. 58, Laws of 1855, reserved the right to repeal or modify this provision of Chap. 47 Laws of 1856. The language of said section 9 is that the "legislature of the territory or future state of Minnesota may repeal, amend or modify this act and the act to which it is amendatory from and after the expiration of 20 years from the date of passage of this act provided that compensation be made to said company for all damages sustained thereby." This provision for gross earnings taxation had not then been enacted. It was a part of the later act of 1856. It is at least doubtful whether the clause in the act of 1855 above quoted gives any power to amend the later act of 1856. However this may be, the power of amendment is upon the proviso that compensation be made for all damages sustained thereby. Manifestly this proviso is as broad as the power of amendment and appertains to every section which may be amended pursuant to the power here given. In such a case an amendment made without provision for compensation impairs the obligation of the contract entered into (Asylum v. New Orleans, 105 U. S. 362, 369).

3. The next question is: Did the Minnesota & Northwestern Railroad Company lose or forfeit this right by delay in the completion of its road. In my judgment, it did not. The Minnesota & Northwestern Railroad Company built this road. It did not do so within

the time provided nor for many years thereafter. In the meantime the state had the undoubted right to forfeit the charter and
382 rights of the Minnesota & Northwestern Railroad Company, but it did not do so. On the contrary, it confirmed them by passing Chap. 102, Laws 1872, which gave the company the right to change its name, and Chap. 83, Laws 1883, which amended its charter and expressly confirmed its right to proceed thereunder. The road was completed to the Iowa line in 1885, and for 20 years thereafter the Minnesota & Northwestern Company and its successors paid, and the state received, the percentage of gross earnings stipulated in the act of 1856 in lieu of all other taxation. It is well settled in this state that the company's charter and rights could not be forfeited without affirmative action of some sort on the part of the state. It is also well settled that the state may waive its right of forfeiture. The facts above mentioned constitute a complete waiver and the state cannot now insist that the company's rights were forfeited.

State v. Minn. Central Ry. Co., 36 Minn. 246, 258;
State v. St. Paul & Sioux City R. R. Co., 35 Minn. 222;
Minn. Central Ry. Co. v. Melvin, 21 Minn. 339.

It is contended that inasmuch as the road was not completed until 1885, the contract did not become operative until then, and it must then be subject to the constitution of the state which then permitted the enactment of laws for gross earnings taxation, but provided for a right of repeal. But the act was passed and accepted prior
383 to the adoption of the constitution and the force or effect of the act as a contract must be determined as of the time of its passage and acceptance (Planters Ins. Co. v. Tennessee, 161 U. S. 193, 197). This force or effect as a contract the constitution did not in any manner impair. No right of forfeiture then existed and the constitution did not and could not abrogate subsisting contract rights granted by the territorial legislature (First Division v. Parcher, 14 Minn. 297). The fact that some years later the state had an accrued right of forfeiture which it waived, does not change the situation. The constitution affects only new grants and waiver of a forfeiture does not in any sense constitute a new grant.

If the Minnesota & Northwestern Railway Company still owned this road there could be no serious question as to its being entitled to all the benefits and privileges of its original charter.

4. The next question is did these rights and privileges pass to the Chicago, St. Paul & Kansas City Railway Company and to the Chicago Great Western Railway Company? I regard this question as settled by the decisions of the supreme court of this state.

The facts are: that in 1887 the Minnesota & Northwestern Railroad Company consolidated with the Chicago, St. Paul & Kansas City Railway Company, an Iowa corporation, under express legislative authority, and, pursuant to the agreement of consolidation, transferred to said Kansas City Company "all its contracts,
384 rights, privileges and immunities * * * and generally all its property, real, personal and mixed * * * and all appurtenances thereto." In 1892 the road was subject to mortgages to secure the payment of certain bonds, which mortgages provided

that in the event of default in payment of principal or interest the majority in interest of the bondholders should have the right to agree upon a plan of reorganization. In 1892 and 1893, the Kansas City Company became financially involved, and under the provisions above mentioned, the road was reorganized by the bondholders, with the assent of the stockholders, as the Chicago, Great Western Railway Company; stock of the Kansas City Company was exchanged for common stock in the Great Western Company; the mortgage bonds above mentioned were exchanged for debenture stock and preferred A stock in the Great Western Company, and a committee of the holders thereof was vested with general supervision and control of the finances of the Company. The parties in interest remained the same as before and the Kansas City Company transferred to the Great Western Company its railroad "together with all its franchises * * * leases, contracts, rights, privileges and immunities * * * and generally all its property, real, personal and mixed * * * and all appurtenances thereto." No question is made as to the legal authority of these transfers as transfers of the road and all assignable rights incident to it, and the language of the transfers is certainly broad enough to carry
385 the rights here in question if they can be so transferred (County of Nobles v. Railroad Co., 26 Minn., 294; County of Traverse v. Railway Co., 73 Minn. 117).

If this were a new question it might be open to serious doubt whether such rights are the subject of transfer, but I regard it as affirmatively decided in this state that they are transferable. The decisions bearing on this subject are cited and commented upon in County of Traverse v. Railway Co., 73 Minn. 117, supra. Reference will here be made to some of them. It has long been held in this state that such a right was not personal to the original company, but was alike applicable to any of its successors which might assume the completion of the road, and that by what company this was done is a matter of no moment (First Division v. Parcher, 14 Minn. 297; C. M. & St. P. Ry Co. v. Pfaender, 23 Minn. 217). This was on the ground that the right in question is a "contract right" and "a right appurtenant to the lines of road."

It is urged that a different rule is applicable where, as here, the transferee company did not, in fact assume the completion of the road. But later cases have applied the same principles to companies which had no part in the original construction, but later simply acquired the road and assumed its operation.

In State v. St. P. M. & M. Ry. Co., 30 Minn. 311, and State v. N. P. Ry. Co., 32 Minn. 294, was involved a line of railroad between St. Paul and St. Cloud then owned by the St. Paul, Minneapolis & Manitoba Railway Company and over which the Northern
386 Pacific Company ran its trains by virtue of a contract between these companies. This line was part of the road contemplated in the original charter of the Minnesota & Pacific Railroad Company. The property of this road was acquired by the state under mortgage foreclosure, then sold by the state to the St. Paul & Pacific Railroad Company, and then passed by transfer to

the First Division of the St. Paul & Pacific Railroad Company which built the road. After the road was completed it passed by foreclosure in 1879 to the Manitoba Company and still later this portion of it passed by the contract mentioned to the Northern Pacific Company. The original charter of the Minnesota & Pacific Railroad Company contained a provision for taxation similar to the one in question here.

In State v. St. P. M. & M. Ry. Co. (supra) the Court said: "Leasing or selling the railroad cannot affect the rights of the state. Into whose hands soever the railroad may pass, and whoever may receive the gross earnings the obligation to pay and the right of the state to receive the three per centum on such gross earnings are unimpaired."

And in State v. N. P. R. R. Co. (supra) the Court said: "When the line of road in question here passed to the St. Paul & Pacific Railroad Company, then to the First Division of the St. Paul & Pacific Railroad Company, and finally to the St. Paul, Minneapolis & Manitoba Railway Company, each took it with the ex-
387 emption and the obligation to pay the percentage, and as the exemption and charge would accompany any part, however small, of the original company's lines, it follows that, ordinarily, if any company should acquire any estate or interest in any part of such lines that would give it the right to operate the same as a railroad, and to receive gross earnings from operating it, the company would take and hold such estate or interest exempt from taxation, but subject to the obligation to pay the percentage, on the gross earnings received by it."

In County of Traverse v. Railroad Company, 73 Minn. 417 (supra) the rights of the Manitoba Company as to another part of its property were before the Court and the question was squarely presented whether this exemption from ordinary taxation passed to a company which did not have any part in the construction of the road. The contentions made here, on this branch of the case, were urged on the argument of that case and were ably set forth in a dissenting opinion by Canty, J., but the majority of the Court held "that the exemption of the road and land grant of the First Division of the St. Paul & Pacific Railway Company from ordinary taxation in consideration of the payment to the state of a percentage of the gross earnings of its road was not a mere personal privilege to that company, but was appurtenant to the line of road and the lands, and transferable to any other company which might acquire the road and assume its operation," and that " the immunity as
388 well as the burden passed to any company which acquired the road and assumed its operation and the performance of all the other public duties which the original company owed to the public."

The particular question there before the Court was whether the right of exemption from ordinary modes of taxation was transferable, but the principle is the same as here. If the right to a particular form of taxation given by a legislative act is transferable, it would

seem that the right to a particular rate of taxation given by the same act is also transferable; and it has been so held.

In the case of Minneapolis & St. Louis R. R. Co. v. Koerner, 85 Minn. 149, plaintiff railroad company purchased a road subject to a one per cent gross earnings tax. Plaintiff was obliged to pay, on its own gross earnings, three per cent. It was held that plaintiff acquired by its purchase of the road in question the right to the 1% rate of taxation to which the road was subject. The Court said, "it was immaterial to the state whether such new roads continued to be operated by a purchaser or whether they continued to be owned and operated by the original corporation."

If rights of this character pass by sale of the road to an independent company, the right here in question certainly passed on consolidation to the Kansas City Company and on reorganization to the Great Western Company.

I am aware that these decisions are, on this point, out of harmony with the decisions of the United States Supreme Court. That fact was fully considered by the Supreme Court of this state in
389 the Traverse County case. This Court must follow the decisions deliberately made by the Supreme Court of this state. It is urged that the Supreme Court of the United States is the court of last resort for the determination of this question. That Court is the court of last resort for the determination of the question whether a statute impairs the obligation of contracts. It is also the province of that court to construe the meaning of a statute to determine whether a contract is contained therein and whether the state has passed any law impairing its obligation. In so doing that court is not ordinarily bound by the previous decision of the state court. Powers v. Railway Co., 201 U. S. 543, 556. But the rule is otherwise when the decisions of the state court have "Been so long and firmly established as to constitute a rule of property." Shelby County v. Bank, 161 U. S. 149, 161.

The rule of law above indicated, that the right here involved is a transferable right appurtenant to the road has been adopted, followed by repeated decisions in this state for nearly forty years and as said in Traverse County v. Railroad Co. (supra), "it has become a law of property and must be adhered to."

These cases seem to me to be decisive of this question. They are also decisive of the question that no special legislative authority is necessary to authorize the transfer of such a right. In some of
the cases there was none and in no case was the decision rested
390 upon such special authorization. The principle recognized in these cases is, that a "right appurtenant to the road" passes with any authorized transfer of the road and requires no other or greater authority to support it than is required to support a transfer of the road to which it is appurtenant. It makes no difference whether the purchaser is a new road or an old one or whether it is a domestic or a foreign corporation. If it is authorized to buy a railroad it may buy with its rights "appurtenant to the road."

HALLAM, J.

(Title of Cause.)

Judgment.

Pursuant to findings and order of the Court heretofore filed in the above entitled action on the twenty-ninth day of May, 1908, and upon motion of Davis, Kellogg & Severance and A. G. Briggs, attorneys for defendant,

It Is Hereby Adjudged and Decreed that a certain act of the Legislative Assembly of the Territory of Minnesota, approved March 1st, 1856, being Chapter 47 of the Laws of the said Territory for the year 1856, entitled "An Act granting an extension of time to the Minnesota & Northwestern Railroad Company, and for other purposes," and the acceptance of the provisions thereof which was duly made by said Railroad Company, constituted a valid contract between said Territory, and subsequent State of Minnesota, and said Minnesota & Northwestern Railroad Company, and fixed the
391 lawful rate of taxation to be paid by said Company.

That the said contract was never forfeited or lost by said Minnesota & Northwestern Railroad Company, but was transferred and passed to the Chicago, St. Paul & Kansas City Railway Company, described in the pleadings in this action, and was subsequently transferred to the defendant herein, and that the lawful rate of taxation which the State of Minnesota may exact from said defendant Chicago Great Western Railway Company, as successor of said Minnesota & Northwestern Railroad Company, is the sum of two per cent upon each dollar of the gross receipts, proceeds and income of said defendant Railway Company, so far as the same may be received by or due said Company on that part of said road lying within the limits of the State of Minnesota, and such payments shall be in lieu of, and the Company shall be exempt from the payments of any imposts, taxes, or duties, any law to the contrary notwithstanding.

It Is Further Ordered, Adjudged and Decreed that the plaintiff take nothing by this action, and that the same be and hereby is in all things dismissed.

Dated Sept. 24, 1908.

MATT JENSEN,
Clerk of District Court.

[SEAL.] By G. A. JOHNSON, *Deputy.*

Form approved this 24th day of September, 1908.

OSCAR HALLAM,
District Judge.

392 (Title of Cause.)

Notice of Appeal.

To Messrs. Davis, Kellogg & Severance and A. G. Briggs, Attorneys for Defendant, and Matt Jensen, Esq., Clerk of Court:

You will please take notice that the State of Minnesota, the plaintiff in the above entitled action, hereby appeals to the Supreme Court

from that certain judgment entered therein on September 24, 1908, in favor of the defendant and against the plaintiff, and from the whole thereof.

Dated September 25, 1908.

EDWARD T. YOUNG,
Attorney General,
R. A. STONE,
Attorneys for Plaintiff.

Due service of the foregoing notice of appeal this 25th day of September, A. D. 1908, is hereby admitted. A. G. Briggs, Davis, Kellogg & Severance, Attorneys for Defendant; Matt Jensen, Clerk of District Court.

393 STATE OF MINNESOTA:

15991.

Supreme Court, October Term, A. D. 1908.

No. 46.

STATE OF MINNESOTA, Appellant,
v.
CHICAGO GREAT WESTERN RY. CO., Respondent.

Syllabus.

State v. Great Northern Ry. Co., filed herewith, sustaining the validity of Chap. 253, General Laws 1905, increasing the gross earnings tax of railroad companies of the state to four per cent, followed and applied.

Judgment reversed.

391 STATE OF MINNESOTA:

15991.

Supreme Court, October Term, A. D. 1908.

No. 46.

STATE OF MINNESOTA, Appellant,
v.
CHICAGO GREAT WESTERN RY. CO., Respondent.

Opinion.

This action, like that of State v. Great Northern Company, filed herewith, involves the validity of c. 253, General Laws 1905, increasing the rate of the gross earnings tax upon railroad companies

in this state to 4%. As in the Great Northern case, defendant asserts an irrepealable contract, under which it claims the right forever to discharge its tax liability by the payment of a 2% rate. The fixed rate claimed by the Great Northern Company was 3%. The determination of the case involves, as in the other case, the construction of an old territorial railroad charter, the facts with reference to which are as follows.

By c. 47, Territorial Laws 1854, the Minnesota and Northwestern Railroad Company was duly incorporated and authorized to construct a railroad within the limits of the territory, the line of which road in a general way was therein designated. The act was accepted by the persons named as incorporators but no effort was made by them to construct the road. By c. 58, Laws of 1855, the act incorporating the company was amended by adding thereto, among other things, a provision requiring the company to construct and equip fifty miles of its road within three years after the passage of the amendment, and the entire line within six years, in default
395 of which, the act provided, the charter of the company and all grants and rights thereby conferred "shall cease and be void." This act also contained a clause reserving to the legislature the right of amendment after the expiration of twenty years. In the original charter, and also in the amendment just mentioned, the company was required to pay into the treasury of the territory or future state 7% of its net earnings. Whether this was intended as a substitute for taxes to be levied and collected in the usual way was not expressly stated. But in 1856, by c. 47 of the laws of that year, the charter was again amended by imposing a 2% gross earnings tax in lieu of all other taxes. It is upon this act and the rate of taxation therein imposed that defendant relies in support of its defense. Defendant claims to have succeeded to all the rights of this old company, including the right to an irrepealable 2% tax contract. The facts leading up to this asserted succession are as follows: The old company, though fully organized, wholly failed to construct its railroad within the time prescribed by its charter and did nothing in that direction until sometime in 1884, thirty years after its organization and twenty-four years after the time limited for the completion of the road. By this failure the company forfeited all its rights under the charter and all grants thereby conferred "ceased and were void." But by c. 83, Special Laws 1883, the legislature of the state recognized the existence of the corporation and in effect waived the default in the construction of the road by authorizing the consolidation of "its stocks, franchises, rights and property with that of any other railroad company which will undertake the construction and operation of the railroad which the said Min-
396 nesota and Northwestern railroad company is authorized to construct and operate." Sec. 2 of that act amended Sec. 7 of the original charter by authorizing the construction of a line of road differing somewhat from that authorized by the old charter. The company was thus revived from its extended slumbers and proceeded to construct its road, and completed it sometime in the year 1885. It thereafter operated the same until December of 1887, when it conveyed all its property, "contracts, rights, privileges and im-

munities" to the Chicago, St. Paul and Kansas City Railroad Company, a corporation created, organized and existing under the laws of the state of Iowa. Counsel for defendant treat this transfer as a consolidation of the two companies, authorized by the act of 1883. But as we read the documents by which the transfer was effected the transaction took the form of an absolute and unconditional sale by the Northwestern company. The Kansas City Company took possession of the road and thereafter continued its operation until June 1892, when it leased the line and all property connected therewith to the Chicago, Great Western Railroad Company, defendant herein, a corporation organized and existing under the laws of the state of Illinois. Subsequently, in September 1893, the Kansas City Company conveyed the property so leased, and all contracts, franchises, and immunities to its lessee, the Great Western Company, since which time the latter has continued in the operation of the road. Again counsel claim that the conveyance by the Kansas City Company to defendant was a consolidation and authorized by law. This, however, is not important. The fact remains that the transaction resulted in an absolute transfer of the railroad property to defendant, and in as much as both those companies were foreign corporations, the laws of this state would not control their
397 dealings, and this state could neither authorize nor prohibit their consolidation. But that question in no way controls the result in this case. The old Northwestern Company, after the completion of its road in 1885, commuted its taxes by the payment of the 2% rate imposed by the amendment of its charter in 1856, and the succeeding roads, including defendant, have paid the same rate.

Defendant having refused to pay the rate prescribed by the statute under consideration, this action was brought to recover the amount of the increased rate. It is the contention of defendant that the terms of the old Northwestern charter fixing a two per cent rate constituted a contract between the company and the territory or future state, irrevocable and irrepealable, to which defendant has succeeded, and that to enforce the new rate would impair the terms of the contract in violation of both the state and the federal constitutions. Defendant does not contend that the new rate is unreasonable or unfair, or at all disproportionate to the rate paid by other taxpayers, but stands squarely upon its asserted legal right to a perpetual two per cent rate. The trial court sustained this view, ordered judgment for defendant, and the state appealed.

The charter of this road has never heretofore been before the court for construction. No question has ever been raised relative to the rights of defendant or its predecessors upon the subject of taxation; and the construction of the old charter and amendatory acts, and the right of the state to change the rate of taxation thereby imposed, are before us for the first time. Most of the questions involved were presented in the Great Northern case where they
398 were fully considered and disposed of adversely to the contentions of defendant. We there held, among other things, that the charter provisions of the old Minnesota and Pacific Company, upon which the Great Northern Company relied, did not con-

stitute an irrepealable contract which passed unimpaired to the successors of that company; and further that the gross earnings tax system first came into legal existence in this state by force of the constitutional amendment of 1871, and that it then came subject to the reserved right of the state to amend or repeal the same as public interests might justify or require. The language of the charter under consideration, in so far as it imposes this form of taxation, is for all practical purposes the same as that construed in the Great Northern case, and the conclusions there reached fully apply at bar and we adopt and follow them.

The conclusion is in no way affected, nor defendant's rights in any way enlarged or extended, by c. 83, Special Laws 1883. The original company, the Minnesota and Northwestern, failed to construct the road within the time limited by its charter and remained inactive for thirty years. Under the language of the charter, all its rights therefore "ceased and were void," and the charter could have been forfeited by appropriate action of the state. But no proceedings were taken for that purpose, and it may be conceded that the act of 1883 was a recognition of the legal existence of that company at that time and a waiver of the right to declare a forfeiture. But such waiver and recognition were clearly subject to the then existing constitutional mandate prohibiting the granting of special privileges on the subject of taxation. It was also subject to
399 the constitutional amendment of 1871, which provided, in effect, that all gross earnings statutes might be changed or amended by a vote of the people, under the authority of which the statute in question is valid as to defendant. In so far as the legislature may be said by the act of 1883 to have intended or attempted to confer upon the Minnesota and Northwestern Company a perpetual two per cent rate, when all other roads were taxed three per cent, it violated the constitutional mandate of equality in taxation and its action was void. The legislature could no more grant this special privilege by the revival of an old corporation than it could confer a one per cent privilege upon an entirely new company. Neither are the rights of the parties, as urged by defendant, to be construed as of the date the original charter was granted, but, on the contrary, as of the date of the revival of the practically defunct company and the waiver of the right of the state to declare a forfeiture of the charter, namely, at the time of the passage of the act of 1883. At that time the legislature could do one of two things, declare a forfeiture, or waive the right, as it did, and continue the authority of the company to proceed and construct its road; but this was necessarily subject to the then existing constitutional restrictions pertinent to the subject of taxation. Trask v. McGuire, 85 U. S. 391; Louisville, etc., Ry. Co. v. Palmer, 109 U. S. 244; Keokuk Ry. Co. v. Mo., 152 U. S. 301; Yazoo Ry. Co. v. Adams, 180 U. S. 45. At that time the right of the state to change the rate was clear. Stearns v. State, 179 U. S. 223.

Again, the act of 1883 is wholly silent upon the subject of taxation, and, though a consolidation with other lines was authorized,
the right to assign or transfer the commuted system of
400 taxation at an irrepealable rate was not expressly or impliedly granted and did not pass to the successors of the

original company. As stated in a note to Adams v. Ry. Co., 60 L. R. A. 1, the general rule deducible from all the authorities is that an exemption from taxation, belonging to a corporation, is a privilege altogether personal to the grantee, "incapable of transference to another save by a specific enabling law couched in explicit language apt to the purpose." No such language, nor any language indicative of an intention to confer the right of alienation, is found either in the original charter or in the revival act of 1883. An unchangeable rate of taxation did not therefore pass to the successors of the Northwestern Company. Morgan v. La., 93 U. S. 217; Wilson v. Gaines, 103 U. S. 417; Gulf, etc., Ry. Co. v. Howes, 183 U. S. 66; Ry. Co. v. Miller, 114 U. S. 176; Ins. Co. v. Tenn., 161 U. S. 174; City v. Ry. Co., 182 N. Y. 99. The language of the act of 1883 authorizing the Northwestern Company to "consolidate its stock, franchises, rights and property" with any other road, conceding that the transaction by which the defendant succeeded to the rights of the old road amounted to a consolidation, did not, within the authorities cited, include the right to transfer an irrepealable right to a two per cent tax.

Counsel for the state advance several other reasons in support of the contention that the state possesses the right to increase the rate. One of which is found in the reserved right of amendment incorporated in the Northwestern charter by the act of 1885. That act, which amended the original charter, expressly provided that the "legislature of the territory or future state of Minnesota may repeal, amend or modify this act and the act to which this is
401 amendatory from and after twenty years from the passage of this act. Provided compensation be made to said company for all damages sustained thereby." It is insisted that this reservation conferred upon the state the power to increase the tax rate of this road, independently of other grounds urged, while counsel for defendant contend to the contrary. We find it unnecessary to consider this or any other of the points urged by the state, not already passed upon. What has been said disposes of the case and sustains the right of the state to increase the tax and further consideration of the other questions would unnecessarily prolong the opinion.

Our conclusions are that c. 253, General Laws 1905, is valid as to defendant and that the state is entitled to judgment against it for the increased tax.

The judgment appealed from is therefore reversed and final judgment ordered in this court for the amount due the state, as shown by the complaint.

BROWN, *J.*

402 STATE OF MINNESOTA,
Supreme Court, ss:

I, C. A. Pidgeon, Clerk of said Supreme Court, do hereby certify that the foregoing is a full and true copy of the Opinion & Syllabus in the cause therein entitled, as appears from the original, remaining copy in my office; that I have carefully compared the within copy

with said original, and that the same is a correct transcript therefrom, and of the whole thereof.

Witness my hand and seal of said Supreme Court at the Capitol, in the city of St. Paul, this 24th day of February, A. D. 1909.

[Seal of the Supreme Court, State of Minnesota.]

C. A. PIDGEON, *Clerk*.

403 [Endorsed:] No. 15991. State of Minnesota, Supreme Court. State of Minnesota appellant vs. Chicago Great Western Ry. Co. respondent. Opinion and Syllabus. Filed Dec. 24th, 1908. C. A. Pidgeon, Clerk. October Term, A. D. 1908. Brown, J.

404 STATE OF MINNESOTA:

Supreme Court, General October Term, A. D. 1908.

FRIDAY MORNING, 9:30 O'CLOCK.
November 6th, A. D. 1908.

Court convened pursuant to adjournment. All the Justices being present.

Reg. No., 15991; Cal. No., 46.

STATE OF MINNESOTA, Appellant,
vs.
CHICAGO GREAT WESTERN RAILWAY COMPANY, Respondent.

This cause came on to be heard this day upon the return to the appeal herein.

Thereupon the same was argued by counsel, submitted to the court for decision and taken under advisement.

A true record

[Seal of the Supreme Court, State of Minnesota.]

Attest:

C. A. PIDGEON, *Clerk*.

The foregoing is a full and true copy of the Minutes of Argument in the above entitled cause.

Attest:

C. A. PIDGEON, *Clerk*.

405 [Endorsed:] 15991. State of Minnesota Supreme Court. Copy of Minutes of Argument. Filed January 21, A. D. 1909. C. A. Pidgeon, Clerk.

406 STATE OF MINNESOTA:

Supreme Court, October Term, A. D. 1908.

No. 46.

STATE OF MINNESOTA, Appellant,
vs.
CHICAGO GREAT WESTERN RAILROAD COMPANY, Respondent.

Appeal from District Court, Second Judicial District, County of Ramsey.

This cause having been duly argued and submitted at the General October Term of this Court, A. D. 1908, upon the return to the appeal herein.

Now, after full and mature deliberation had thereon, it is here and hereby ordered that the Judgment of the Court below, herein appealed from, be and the same hereby is, in all things reversed and that the Appellant above named have judgment accordingly.

Entered January 21st, A. D. 1909.

By the Court,

[Seal of the Supreme Court, State of Minnesota.]

Attest:

C. A. PIDGEON, *Clerk*.

I hereby certify that the foregoing is a full and true copy of the original Order for judgement entered in the above entitled cause.

Attest:

C. A. PIDGEON, *Clerk*.

407 [Endorsed:] No. 15991. State of Minnesota Supreme Court. Copy of order for judgment. Filed January 21, A. D. 1909. C. A. Pidgeon, Clerk. Entered on Page —.

408 STATE OF MINNESOTA:

Supreme Court, October Term, A. D. 1908.

No. 46.

STATE OF MINNESOTA, Appellant,
vs.
CHICAGO GREAT WESTERN RAILWAY COMPANY, Respondent.

Pursuant to an order of Court duly made and entered in this cause, on the 24th day of December, A. D. 1908.

It is here and hereby determined and adjudged that the Judgment of the Court below, herein appealed from, to wit, of the District Court of the Second Judicial District, Sitting within and for the

County of Ramsey and State of Minnesota, be and the same hereby is in all things reversed and that the judgment be entered in this Court for the amount named in the complaint in said cause, to wit, Twenty-four thousand nine-hundred seventy-nine dollars, and sixty-two cents, ($24,979.62). Now therefore pursuant to said order it is determined and adjudged that State of Minnesota, Appellant above named have and recover of the Chicago Great Western Railway Company, Respondent above named the sum of Twenty-four thousand, nine-hundred seventy-nine dollars, and sixty-two cents, ($24,979.62), and One-hundred sixteen dollars, and fifty-seven cents, ($116.57), interest thereon from the date of said order amounting to the sum of, Twenty-five thousand, ninety-six dollars and nineteen cents, ($25,096.19).

And it is further determined and adjudged that the State of Minnesota, Appellant above named, do have and recover of said respondent, the Chicago Great Western Railway Company, herein the further sum and amount of, Three-hundred forty-three dollars, and twenty-three cents, ($343.23), costs and disbursements in this cause in this Court and in the trial court, all said sums amounting in the aggregate to the sum of, Twenty-five thousand, four-hundred thirty-nine dollars and forty-two cents, ($25,439.42), and that said appellant have execution for the enforcement thereof.

Dated and signed this 21st day of January, A. D. 1909.

By the Court.

Attest:

C. A. PIDGEON, *Clerk.*

Statement for Judgment.

Amount to be entered by order of the Court herein	$24,979.62
Interest thereon from December 24th 1908	116.57
Statutory costs	35.00
Clerk's Fees	38.78
Printer's Fees	256.25
Sheriff's Fees	1.20
Clerk's Fees, Supreme Court	12.00
Total	$25,439.42

STATE OF MINNESOTA,
Supreme Court, ss:

I, C. A. Pidgeon, Clerk of said Court, do hereby certify that the foregoing is a true copy of the Entry of Judgment in the cause therein entitled, as appears from the original remaining of record in my office; that I have carefully compared the within — said original, and that the same is a correct transcript therefrom.

Witness my hand and seal of said Supreme Court at the Capitol in the city of St. Paul, this 21st day of January, A. D. 1909.

C. A. PIDGEON, *Clerk.*

409 [Endorsed:] 15991. State of Minnesota Supreme Court. State of Minnesota, Appellant, vs. Chicago Great Western Railway Company, Respondent. Judgment Roll. Filed January 21, 1909. C. A. Pidgeon, Clerk.

410 STATE OF MINNESOTA:

Supreme Court.

STATE OF MINNESOTA,
Office of Clerk of the Supreme Court, ss:

I, C. A. Pidgeon, Clerk of the Supreme Court, State of Minnesota, do hereby certify and return to the Supreme Court of the United States, that the foregoing and annexed transcript of record is a full and complete transcript of the record, judgment roll and all of the proceedings had in said Supreme Court of the State of Minnesota, in the cause between the State of Minnesota, Appellant, and the Chicago Great Western Railway Company, Respondent, including the opinion of the said Supreme Court in said cause as appears from the original files and records.

And I do further certify and return that I have annexed to said transcript and included therewith, and that the foregoing are, true and correct copies of the Petition for Writ of Error with allowance of same, and order fixing and granting Undertaking on Appeal, Assignments of Error in said cause and Petition for Reversal, and of the Undertaking, as the same remain on file and of record in said Supreme Court of the State of Minnesota, and also the original Writ of Error from the Supreme Court of the United States, and the original Citation issued thereon, with proof of service thereof endorsed thereon, and that the foregoing constitutes a true, full and complete Return to said Writ of Error.

In witness whereof I have hereunto set my hand and Seal of said Supreme Court of the State of Minnesota at the Capitol at St. Paul, Minnesota, this 25th day of February, 1909.

[Seal of the Supreme Court, State of Minnesota.]

C. A. PIDGEON,
Clerk of the Supreme Court,
State of Minnesota.

Endorsed on cover: File No. 21,539. Minnesota Supreme Court. Term No. 277. Chicago Great Western Railway Company, plaintiff in error, vs. The State of Minnesota. Filed March 6th 1909. File No. 21,539.

Office Supreme Court, U. S.
FILED.
MAY 12 1909
JAMES H. McKENNEY,

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. [redacted]3'7'7.

CHICAGO GREAT WESTERN RAILWAY COMPANY,
PLAINTIFF IN ERROR,

vs.

STATE OF MINNESOTA, DEFENDANT IN ERROR.

MOTION TO ADVANCE, POINTS IN SUPPORT THEREOF, AND JOINDER IN MOTION.

GEORGE T. SIMPSON,
Attorney General of Minnesota.
GEORGE W. PETERSON,
Assistant Attorney General of Minnesota.

(21,539.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 743.

CHICAGO GREAT WESTERN RAILWAY CO.,
PLAINTIFF IN ERROR,

vs.

STATE OF MINNESOTA, DEFENDANT IN ERROR.

MOTION TO ADVANCE.

Now comes the State of Minnesota, by George T. Simpson, Attorney General thereof, and moves the court to advance the hearing in the above-entitled action upon the docket and set the same for argument on the 2d day of November, 1909, or at such other time as shall be designated by the court.

This motion is made under and by virtue of section 7 of rule 26 of the rules of this court.

GEORGE T. SIMPSON,
Attorney General of Minnesota.
GEORGE W. PETERSON,
Assistant Attorney General of Minnesota.

Dated May 7, 1909.

SUPREME COURT OF THE UNITED STATES.

CHICAGO GREAT WESTERN RAILWAY CO., *Plaintiff in Error,*

vs.

STATE OF MINNESOTA, *Defendant in Error.*

STATEMENT.

The above-entitled cause is an action by the State of Minnesota against the Chicago Great Western Railway Company to recover the unpaid gross-earnings tax of said company for the year 1905, pursuant to the provisions of chapter 253, General Laws of Minnesota for the year 1903, which increases the rate of gross-earnings tax of railroad companies doing business in Minnesota to four per cent upon such gross earnings.

The rate of gross-earnings tax in the charter of the predecessor in interest of the said Chicago Great Western Railway Company, under which charter the said company claims, is two per cent (chapter 47, Territorial Laws, 1856).

The suit in question was to recover the additional two per cent tax upon the gross earnings of said company for the year 1905, the said company having voluntarily paid the gross-earnings tax for said year at the rate of two per cent.

Said cause was begun in the District Court of Ramsey County, Minnesota, in the year 1906, and was finally determined by the Supreme Court of the State of Minnesota on December 24, 1908, when judgment was rendered in favor of the State of Minnesota and against the Chicago Great Western Railway Company in the sum of $25,439.42, said sum representing the unpaid two per cent of the gross earnings of said company for the year 1905.

And it was then and there adjudicated by the Supreme Court of Minnesota that State *ex.* Great Northern Ry. Co., filed herewith, sustaining the validity of chapter 253, General Laws, 1905, increasing the gross-earnings tax of railroad companies of the State to four per cent, followed and applied.

The decision in the case of State of Minnesota against Great Northern Railway Company was as follows:

Chapter 253, General Laws 1903, approved at the general election of 1904, as provided by section 32 of article 4 of the State Constitution, increasing the rate of the gross-earnings tax of railroad companies doing business in this State to four per cent, is valid as to defendant and all its lines of road and branches thereof. The statute impairs no contractual or other vested right of defendant and is not repugnant to either the State or the Federal Constitution.

The Chicago Great Western Railway Company claims an irrepealable contract right, under and by virtue of the charter to which it claims to have succeeded, to pay a two per cent gross-earnings tax.

Points in Support of the Foregoing Motion.

As bringing the motion within section 7 of rule 26 of the rules of this court, it is respectfully submitted that the following special and peculiar circumstances exist, under and by virtue of which the motion is well made and should be granted:

1. The public revenues of the State of Minnesota are affected in this, that the sum of $25,139.42, being the recovery in the instant case, is withheld from the treasury of the said State.

2. The public revenues of the State of Minnesota are affected in this, that the sum of $30,960.91, being two per cent of the gross earnings of said company for the year 1906, to-

gether with the statutory penalty of five per cent thereon, and for which sum the State of Minnesota has recovered judgment in the District Court of Ramsey County, Minnesota, from which judgment the said company will appeal to the Supreme Court of the State of Minnesota, is withheld from the treasury of the State of Minnesota.

3. The public revenues of the State of Minnesota are affected in this, that the sum of $28,034.21, being two per cent of the gross earnings of said company for the year 1907, together with the statutory penalty of five per cent thereof, and for which sum the State of Minnesota has recovered judgment in the District Court of Ramsey County, Minnesota, from which judgment the said company will appeal to the Supreme Court of the State of Minnesota, is withheld from the treasury of the State of Minnesota.

4. That the public revenues of the State of Minnesota are affected in this, that the sum of $26,120.21, being two per cent of the gross earnings of said company for the year 1908, together with the statutory penalty of five per cent thereon and for which sum judgment has been rendered in favor of the State of Minnesota in the District Court of Ramsey County, Minnesota, from which judgment said company will appeal to the Supreme Court of the State of Minnesota, is withheld from the treasury of the State of Minnesota.

5. Like sums in taxes will accrue to the State of Minnesota for the years 1909 and 1910, and be withheld from the treasury of the State of Minnesota in case this cause is not advanced upon the docket, for in its order said cause will probably not be determined before the taxes for said years are due.

6. This motion is made concurrently with a motion to advance the cause entitled Great Northern Railway Company, plaintiff in error, against State of Minnesota, defendant in

error, which last-mentioned cause involves substantially the same questions as this cause. The recovery in taxes in the case of the Great Northern Railway Company, decided by the Supreme Court of Minnesota December 24, 1908, being the same date as the decision in the case of State of Minnesota against the Chicago Great Western Railway Company, which last cause followed the decision in State of Minnesota against Great Northern Railway Company, is the sum of $121,601.27, and several actions are now pending in the courts of Minnesota for the recovery of the unpaid taxes of the Great Northern Railway Company for the years 1906 ($133,115.14), 1907 ($139,254.04), and 1908 ($131,-262.71), said sums aggregating $525,233.16, all of which sums are withheld from the treasury of the State of Minnesota, and like sums in taxes will accrue to the State of Minnesota from said company for the years 1909 and 1910 and be withheld from the treasury of the State of Minnesota in case said cause is not advanced upon the docket, for in its order said cause will probably not be determined before the taxes for said years are due.

7. The withholding of said sums from the public revenues of Minnesota does embarrass the administration of the government of said State in this, that in the aggregate covering the years 1905, 1906, 1907, 1908, 1909, and 1910 the gross sum of, to wit, $949,769.91, will be withheld from the public revenues.

The validity of said sums as taxes due the State of Minnesota depends upon the decisions of this court in the causes now proposed to be advanced.

8. The importance of the advancement of this cause upon the docket to the Chicago Great Western Railway Company becomes likewise self-evident, so much so that said company joins in a request that the said cause be advanced.

For the reasons stated, it is submitted that the cause should be advanced under the rule.

Respectfully,

GEORGE T. SIMPSON,
Attorney General of Minnesota.
GEORGE W. PETERSON,
Assistant Attorney General of Minnesota.

Dated May 7th, 1909.

STATE OF MINNESOTA,
County of Ramsey, ss:

George W. Peterson, being first duly sworn, does depose and say that he is Assistant Attorney General of the State of Minnesota, that he has read the foregoing statement and points in support of the foregoing motion, and that the same are true of his own knowledge, except those matters stated on information and belief, and as to these he believes them true.

GEORGE W. PETERSON.

Subscribed and sworn to before me this 7th day of May, 1909.

[Notarial Seal, Ramsey County, Minn.]

SADIE H. YOUNG,
Notary Public, Ramsey County, Minnesota.

My commission expires February 9, 1912.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1908.

No. —.

CHICAGO GREAT WESTERN RAILWAY CO., *Plaintiff in Error,*
vs.
STATE OF MINNESOTA, *Defendant in Error.*

NOTICE.

To Chicago Great Western Railway Company, plaintiff in error, and A. G. Briggs, general solicitor, and Davis, Kellogg and Severance, of counsel:

Please take notice that on Monday, the 17th day of May, 1909, at the opening of the court, or as soon thereafter as counsel can be heard, the motion of which the foregoing is a copy will be submitted to the Supreme Court of the United States for the decision of said court thereon. Annexed hereto is a copy of the brief or argument to be submitted with the said motion in support thereof.

Dated May 7, 1909.

GEORGE T. SIMPSON,
Attorney General of Minnesota.
GEORGE W. PETERSON,
Assistant Attorney General of Minnesota.

SUPREME COURT OF THE UNITED STATES.

CHICAGO GREAT WESTERN RAILWAY CO., *Plaintiff in Error,*
vs.
STATE OF MINNESOTA, *Defendant in Error.*

JOINDER IN MOTION.

Now comes the Chicago Great Western Railway Company, plaintiff in error, by A. G. Briggs, general solicitor, and joins in the motion of the State of Minnesota, defendant in error, to advance the said cause upon the docket, and prays that said motion be granted and that said motion may be heard in its order on May 17, 1909.

Receipt of a copy of the brief and argument to be submitted with said motion and in support thereof is hereby acknowledged.

A. G. BRIGGS,
General Solicitor Chicago Great Western Railway Co.

DAVIS, KELLOGG & SEVERANCE,
Of Counsel.

Dated May 7, 1909.

Supreme Court of the United States

Supreme Court of the United States.

OCTOBER TERM, 1909.

NO. 377.

CHICAGO GREAT WESTERN RAILWAY COMPANY,
Plaintiff-in-Error,

vs.

STATE OF MINNESOTA,
Defendant-in-Error.

On Writ of Error to the Supreme Court of Minnesota.

BRIEF OF PLAINTIFF-IN-ERROR.

STATEMENT OF THE CASE.

The precise question involved is whether under section 2 of the Act of March 1, 1856, forming a part of the charter of the Minnesota & Northwestern Railroad Company, the plaintiff-in-error has a contract for a commuted system of taxation which the State cannot now repeal. The present action is one to recover a balance of about $25,000

alleged to be due from the plaintiff-in-error under the Minnesota Four Per Cent Gross Earnings Law of 1905. The Railway Company has paid a tax of 2% for that year and contends that on account of the contract above mentioned it cannot be compelled to pay a higher rate. It is submitted that, as applied to the plaintiff-in-error the Gross Earnings Law of 1905 amounts to an impairment of the obligation of the contract embodied in the charter of 1856.

Two principal questions are involved: First, Whether the charter provision relied upon is subject to repeal; and second, Whether the plaintiff-in-error is entitled to claim the immunity conferred originally upon the Minnesota & Northwestern Railroad Company.

The original Act incorporating the Minnesota & Northwestern Railroad Company was passed March 4th, 1854. It was thrice amended in 1855, and once in 1856. One of the amendments made in 1855 comprised in an Act passed Feb. 17th, 1855, contained among other provisions the following:

> "Sec. 9. Legislature of the Territory or future State of Minnesota may repeal, amend or modify this act and the act to which this is amendatory from and after the expiration of twenty years from the date of the passage of this act. *Provided*, that compensation be made to said Company for all damages sustained thereby."

The amendment of 1856 was contained in an act entitled: "An act granting an extension of time to the Minnesota and North Western Railroad Com-

pany, and for other purposes," approved March 1, 1856. Sections 2 and 3 of that law read as follows:

"Sec. 2. In consideration of the grant of lands contemplated in the 8th section of the Charter to said Company, approved March 4th, 1854, and of the extension of time to said Company as herein stated, and in further consideration of the restoration of all rights, powers and franchises to said Company which may be supposed to have for any cause become forfeited to the Territory of Minnesota, said corporation binds and obliges itself to pay or cause to be paid to the Territory or future State of Minnesota, two per cent. upon each dollar of the gross receipts, proceeds and income of said railroad, so far as the same may be received or due them on that part of said road lying within the limits of the Territory or future State of Minnesota, to be paid to the Treasurer of said Territory or future State annually, on the first day of January in each year, from and after the day when the cars shall commence running on any part of said road in said Territory or future State of Minnesota, and which proceeds shall be appropriated to the payment of the Territorial or State government expenses, and such payments shall be in lieu of, and the said Company shall be exempt from the payment of any other imposts, taxes or dividends, any law to the contrary notwithstanding.

"Sec. 3. And for the purpose of ascertaining the proceeds, receipts or income aforesaid, an accurate account shall be kept by said Company, a copy whereof shall be furnished to the Governor of the Territory or future State of Minnesota: the truth of which account shall be verified by the affidavits of the President and Treasurer of said Company. And for the purpose of verifying and ascertaining the accuracy of such account, full power is hereby vested in the Governor of the Territory or future State of Minnesota, or any other person

by law appointed, to examine the books and papers of said corporation, and to examine, under oath, the officers, agents and employees of said Company, and other persons, and if any person so examined by the Governor, or other authority, shall knowingly and willingly swear falsely, or if the officers making such affidavits shall knowingly and willfully swear falsely, every such person shall be subject to the pains and penalties of perjury. The Territory or future State of Minnesota shall have a prior lien upon said road and branches, and all the appurtenances and stock thereof, for all penalties, taxes and dues which may accrue to the Territory or future State from said corporation, as herein provided; which lien of the Territory or future State shall take precedence of all demands, judgments or decrees against said corporation."

In 1858 the first state legislature further amended the charter of the Minnesota & Northwestern Railroad by passing "An act to relieve the Minnesota & Northwestern Railroad Company," approved August 10th,1858. (C. 224, Special Laws of 1858.) By this act the company was released from building a portion of the road southward on the Mississippi River, provided it should agree to waive all claim upon the $5,000,000 loan to railroads provided for in the constitution of the state.

In 1872 the legislature further amended the charter of the company by an act authorizing the board of directors to change the name to St. Paul & Iowa Railroad Company, "or such other name as said board of directors shall select." (C. 102, Special Laws of 1872.)

In 1883 the charter of the company was again amended by an act reading as follows:

"Section 1. That the Minnesota and Northwestern Railroad Company, created, organized and existing by and under an act of the legislature of the Territory of Minnesota entitled 'An act to incorporate the Minnesota and Northwestern Railroad Company,' approved March fourth (4th) one thousand eight hundred and fifty-four (1854), and acts amendatory thereto, is hereby authorized to consolidate its stock, franchises, rights and property with that of any other railroad company which will undertake the construction and operation of the railroad which the said Minnesota and Northwestern Railroad Company is authorized to construct and operate.

"Sec. 2. The seventh section of said original act incorporating the Minnesota and Northwestern Railroad Company is hereby amended to read as follows:

"Section 7. The said corporation is hereby authorized and empowered to survey, locate, construct, complete, alter, maintain and operate as a railroad, with one (1) or more tracks or lines of rails, with all necessary bridges, from such a point on the northern boundary of the State of Iowa as the board of directors of said corporation shall designate, northerly, by way of the cities of St. Paul and Minneapolis, to the northern boundary of this State." (C. 83, Special Laws of 1883.)

Although the original act of March 4, 1854, called for the construction and completion of at least fifty miles of the road within three years after the acceptance of the charter, and the whole of the road within three years thereafter, the road was not in fact completed until the year 1885. From the latter date until 1905 the company and its successors paid, and the state accepted, taxes computed pursuant to section 2 of the Act of 1856.

As its taxes for 1905 the company paid in accordance with the regular rate of two per cent, and that amount was accepted by the state treasurer. The present suit is for the recovery of the additional two per cent for 1905, provided for by the Gross Earnings Act of that year.

On December 8, 1887, the Minnesota & Northwestern Railroad Company, at that time owning a line of railway running from St. Paul to the southern boundary of the state, and also a line from the southern boundary of the state through Oelwein in the States of Iowa, to Dubuque, Iowa, and thence to Chicago, Illinois, effected a consolidation with another company known as the Chicago, St. Paul & Kansas City Railway Company, which owned a line of railway extending through Oelwein, Iowa, in a southwesterly direction to Des Moines, Iowa, and was constructing a line from Des Moines to St. Joseph, Mo. Both of these companies were at the time of the consolidation duly authorized to consolidate with intersecting lines, by the laws of Minnesota, Illinois and Iowa.

The plaintiff-in-error, Chicago Great Western Railway Company, is an Illinois corporation, organized prior to the year 1892. On June 13, 1892, the Chicago, St. Paul & Kansas City Railway Company, that being the name of the prior consolidation, leased all of its line of railway to the Chicago Great Western Railway Company; and in September, 1893, the two companies, being authorized so to do by the laws of Illinois, Iowa and Minnesota, duly entered into a contract of consolidation. The

various deeds and agreements relating to both consolidations will be found attached to the answer (Record, folios 18 to 71).

In 1897 the Railroad & Warehouse Commission of Minnesota had a hearing upon the question whether it should verify to the State 3% or 2% as the rate of taxation applicable to the company. The Commission was acting under Section 1679 of the Statutes of 1894, now carried forward as Section 1006 of the Revised Laws of 1905. After a full hearing and argument, the Commission held that the charter had been accepted and the line constructed so as to entitle the State to the gross earnings tax of 2% provided for in the charter, and no more (Record, folios 97 to 107).

Each and all of the Acts constituting the charter of the Minnesota & Northwestern Company were duly accepted by that company within the times and in the manner provided by said Acts respectively. (Findings of trial Court, Record, folio 365.)

The facts in the case, as above outlined, are undisputed and fully appear in the stipulation of facts (Record, folios 73 to 89) and in the findings of fact of the trial court (Record, folios 360 to 375).

The trial court, following a long line of decisions of the Supreme Court of Minnesota, rendered judgment in favor of the plaintiff-in-error, holding that the rate of taxation to which the property of the plaintiff-in-error was subject was fixed and determined by the contract embodied in the Act of the Territory of Minnesota of March 1, 1856. An appeal being taken from the judgment in favor of

the plaintiff-in-error to the Supreme Court of Minnesota, that court reversed said judgment and entered judgment against the plaintiff-in-error for the sum of $25,439.42 (Record, folios 408, 409). The opinion of the Supreme Court of Minnesota appears in the Record, folios 394 to 401. The opinion of the Supreme Court of Minnesota in the case of the State v. the Great Northern Railway Company, which is referred to in the opinion in the present case, is reported in 106 Minn. 303, and 119 N. W. 202. Both that case and the present case have been removed to this court by writ of error.

ASSIGNMENTS OF ERROR.

Said Supreme Court of the State of Minnesota erred:

1. In holding that Chapter 253 of the General Laws of the State of Minnesota for 1903, approved at the general election of 1904, increasing the rate of the gross earnings tax of railroad companies doing business in this State to four per cent, is valid as to the plaintiff-in-error, and in holding that said statute does not impair the contractual rights of the plaintff-in-error, and is not repugnant to Section 10 of Article 1 of the Constitution of the United States, wherein it is provided that no state shall pass any law impairing the obligation of contracts. It should have held that said Chap. 253 of the General Laws of Minnesota for 1903 does impair the contractual rights of the plaintiff-in-error, and is therefore invalid by reason of its being repugnant to said Section 10 of Article 1 of the Constitution of the United States.

2. In holding that said Chapter 253 of the General Laws of the State of Minnesota for 1903 is valid as to the plaintiff-in-error, and that said statute does not deprive the plaintiff-in-error of its property without due process of law. It should have held that said Chapter 253 is invalid as to plaintiff-in-error because said Chapter 253 deprives the plaintiff-in-error of its property without due process of law, in that it attempts to destroy and take from the plaintiff-in-error without compensation a right appurtenant to its lines of railway created by the Act of March 4, 1854, being the charter of the Minnesota & Northwestern Railroad Company, the predecessor in interest of plaintiff-in-error Chicago Great Western Railway Company, and acts amendatory thereof; all in violation of Section 1 of Article 14 of the amendments to the Constitution of the United States.

3. In holding that the Act of March 4, 1854, being the charter of the Minnesota & Northwestern Railroad Company, and acts amendatory thereto, accepted by said company, did not constitute an irrevocable contract between the State of Minnesota and said Minnesota & Northwestern Railroad Company, by which said company became entitled to enjoy a fixed commuted system of taxation at the rate of 2% upon its annual gross earnings. It should have held that such acts did constitute an irrevocable contract between said State of Minnesota and said railway company, under which the latter was entitled to enjoy said fixed commuted rate of taxation.

4. In holding that the right of the Minnesota & Northwestern Railroad Company to a commuted system of taxation at the rate of 2% upon its annual gross earnings, arising under the Act of March 4, 1854, and acts amendatory thereto, did not pass to the Chicago, St. Paul & Kansas City Railway Company, under and through the consolidation of the said companies on December 8, 1887. The court should have held that by such consolidation of December 8, 1887, all such rights of the aforesaid Minnesota & Northwestern Railroad Company passed to said Chicago, St. Paul & Kansas City Railway Company, and that thereafter said Chicago, St. Paul & Kansas City Railway Company became entitled to enjoy the same rights and privileges in regard to taxation that theretofore had been enjoyed by said Minnesota & Northwestern Railroad Company.

5. In holding that the right of the Chicago, St. Paul & Kansas City Railway Company to enjoy a commuted system of taxation at the rate of 2% upon its annual gross earnings acquired under and through the consolidation with the Minnesota & Northwestern Railroad Company, effected on December 8, 1887, did not pass and accrue to the Chicago Great Western Railway Company through the contract of consolidation entered into between said Chicago, St Paul & Kansas City Railway Company and said Chicago Great Western Railway Company on September 7, 1893. The court should have held that by reason of said consolidation between said railway companies all such rights of said Chicago,

St. Paul & Kansas City Railway Company passed to said Chicago Great Western Railway Company, and that thereafter said latter company became entitled to enjoy the same rights and privileges in regard to taxation that theretofore had been enjoyed by said Minnesota & Northwestern Railroad Company.

6. In holding that the Act of March 4, 1854, and acts amendatory thereto, did not constitute an irrevocable contract between the State of Minnesota and the Minnesota & Northwestern Railroad Company, by which said company became entitled to a fixed commuted rate of taxation at the rate of 2% upon its annual gross earnings, and that by the consolidation of December 8, 1887, between said railroad company and the Chicago, St. Paul & Kansas City Railway Company, and by the consolidation of said railway company and the Chicago Great Western Railway Company on September 7, 1893, said Chicago Great Western Railway Company did not become entitled to enjoy the same rate of taxation. The Court should have held that said Act of March 4, 1854, and acts amendatory thereto, constituted an irrevocable contract between the State of Minnesota and the Minnesota & Northwestern Railroad Company, and that by the acts of consolidation aforesaid, all the rights created by said contract, including the right to pay said 2% upon the annual gross earnings of the railroad in lieu of all other taxes, passed to and are vested in plaintiff-in-error Chicago Great Western Railway Company.

7. In holding that the transaction of December 8, 1887, between the Minnesota & Northwestern

Railroad Company and Chicago, St. Paul & Kansas City Railway Company was a sale and not a consolidation pursuant to Chap. 83, Special Laws of 1883, authorizing the consolidation of said Minnesota & Northwestern Railroad Company with any other company which would undertake the construction and operation of its railroad. The Court should have held that such transaction was a consolidation pursuant to said act and was not a sale.

8. In holding that the transaction between the Chicago, St. Paul & Kansas City Railway Company and the Chicago Great Western Railway Company, on September 7, 1893, was a sale and not a consolidation pursuant to the Laws of the State of Minnesota. The Court should have held that such transaction was a consolidation of said railway companies, and not a sale.

9. In holding that the amendment to Article 4 of the Constitution of the State of Minnesota, by the addition of Section 32a to said Article 4, gave to the legislature the power to amend or repeal the charter of the Minnesota & Northwestern Railroad Company, insofar as the same related to the fixed commuted rate of taxation of 2% upon the annual gross earnings of said company. The Court should have held that the Act of March 4, 1854, and the acts amendatory thereto, constituting the charter of said company, constituted an irrepealable contract between the State of Minnesota and said company, and that said constitutional amendment could not give the legislature any power to repeal or modify said contract.

10. In holding that when any and all grounds of forfeiture against the Minnesota & Northwestern Railroad Company were waived by the State by the passage of Chap. 83 of the Special Laws of 1883, such waiver did not revive in full force and effect the charter of said Minnesota & Northwestern Railroad Company. The court should have held that such waiver did so revive and render fully and completely operative the charter of said railroad company as constituted by the original Act of March 4, 1854, and acts amendatory thereto.

11. In holding that the rights of the Minnesota & Northwestern Railroad Company, especially its right to enjoy a fixed commuted system of taxation, was to be determined, not as of the date of its original charter of March 4, 1854, and acts amendatory thereto, but as of the date of the passage of Chap. 83 of the Special Laws of 1883. The Court should have held that such rights were to be determined and construed as of the date of the passage of the Act of March 4, 1854, and of acts amendatory thereto, especially Chap. 47 of the Laws of 1856.

12. In holding that Chap. 83, Special Laws of 1883, did not confer upon the Minnesota & Northwestern Railroad Company the authority to transfer its right to a commuted system of taxation. It should have held that by said Chap. 83 said railroad company was authorized and empowered to convey all its rights and privileges, including the rights to said commuted system of taxation, to the Chicago, St. Paul & Kansas City Railway Company,

with which company it consolidated, pursuant to the provisions of said Chap. 83.

13. In holding that the decisions of the Supreme Court of the State of Minnesota have not created a rule of property in that state which vested in the plaintiff-in-error a property right to a fixed commuted system of taxation at the rate of 2% upon its annual gross earnings, and should have held that said decisions have created such a rule of property as to vest such property right in plaintiff-in-error.

14. In ordering judgment to be entered in favor of said State of Minnesota and against said Chicago Great Western Railway Company for the sum of $24,979.62, because of each and every of the errors hereinbefore assigned.

15. The court should have ordered that the judgment of the District Court by which it was adjudged that the defendant-in-error take nothing by this action should be affirmed.

ARGUMENT.

The plaintiff-in-error contends:

I.

IT HAS LONG BEEN SETTLED IN THIS COURT THAT WHERE THE QUESTION INVOLVED IS AS TO WHETHER A CONTRACT HAS BEEN IMPAIRED BY A LAW OF A STATE, THIS COURT DETERMINES FOR ITSELF THE EXISTENCE AND SCOPE OF THE CONTRACT AND WHETHER THE LAW OF THE STATE IN QUESTION, AS CONSTRUED BY THE COURT OF LAST RESORT OF SUCH STATE, DOES IN FACT IMPAIR THE OBLIGATION OF SUCH CONTRACT.

Wright v. Nagle, 101 U. S. 791, 793;
Gas Co. v. Gas Light Co., 115 U. S. 683, 692;
Railroad Co. v. Tennessee, 153 U. S. 486, 492;
Stearns v. Minnesota, 179 U. S. 223, 233;
Muhlker v. Railway Co., 197 U. S. 544, 570;
Powers v. Railway Co., 201 U. S. 543, 546.

II.

THE FAILURE ON THE PART OF THE COMPANY TO BUILD THE LINE WITHIN THE PERIOD PROVIDED BY THE CHARTER DID NOT IPSO FACTO WORK A FORFEITURE OF THE COMPANY'S CHARTER RIGHTS AND POWERS.

III.

ANY DEFAULT ON THE PART OF THE RAILWAY COMPANY WHICH MAY HAVE EXISTED AS A GROUND OF FORFEITURE WAS WAIVED BY THE STATE.

IV.

THE CONTRACT FOR A COMMUTED SYSTEM OF TAXATION WAS APPURTENANT TO THE LINE OF ROAD EVENTUALLY CONSTRUCTED, AND DULY PASSED TO THE PLPAINTIFF-IN-ERROR AS THE SUCCESSOR OF THE MINNESOTA & NORTHWESTERN RAILROAD COMPANY.

V.

THE LEGISLATURE OF THE STATE HAS NO POWER TO REPEAL, AMEND OR MODIFY THE CHARTER BY CHANGING THE RATE OF TAXATION.

VI.

AT THE TIME OF THE CONSTRUCTION OF THE ROAD IN 1885, AT THE DATE OF THE CONSOLIDATION WITH THE CHICAGO, ST. PAUL & KANSAS CITY RAILWAY COMPANY IN 1887, AND AT THE DATE OF THE LAST CONSOLIDATION, WITH THE PLAINTIFF-IN-ERROR IN 1893, THE LAW HAD BEEN SO LONG SETTLED BY THE SUPREME COURT OF MINNESOTA, THAT CONTRACTS OF THE NATURE OF THE ONE UNDER CONSIDERATION WERE APPURTENANT TO THE PROPERTY AND WOULD PASS TO A SUCCESSOR CORPORATION, THAT SUCH HOLDINGS HAD BECOME A RULE OF PROPERTY UPON WHICH INVESTORS WERE ENTITLED TO RELY, AND THE RULE COULD NOT BE THEREAFTER CHANGED BY SUCH COURT SO AS TO AFFECT THE RIGHTS AND OBLIGATIONS OF THE PLAINTIFF-IN-ERROR.

We will discuss these propositions, other than the first,—which does not need to be enlarged upon,—in the order in which we have stated them.

II.

THE FAILURE ON THE PART OF THE COMPANY TO BUILD THE LINE WITHIN THE PERIOD PROVIDED BY THE CHARTER DID NOT IPSO FACTO WORK A FORFEITURE OF THE COMPANY'S CHARTER RIGHTS AND POWERS.

The argument made in behalf of the State presupposes a contractual relation between the parties very different from that which actually exists. It is contended that the 2% tax on gross earnings provided in section 2 of the act of 1856 was in the nature of an immunity which was to be earned by the company through the performance of certain conditions. It is then suggested that the 2% proposition did not become binding so as to give rise to a contract between the state and the company until the principal condition, to-wit, the construction of the line, had been complied with. Inasmuch as this event did not take place until 1885, the conclusion is drawn that the contract for the so-called immunity was made after the adoption of the constitution and was consequently subject to the right to amend or repeal.

This view fails to take into account, first of all, the precise situation in which the parties found themselves when the charter was granted. The 2% gross earnings tax was not apparently regarded at that time as a grant of an immunity at all. The language of section 2 of the act of 1856 would seem to indicate quite the contrary. It states in substance that in consideration of the grant of lands

made in the 8th section of the original charter and of the extension of time then given, and in further consideration of all rights, powers and franchises which might be supposed to have become forfeited to the Territory for any cause, the corporation bound itself to pay the Territory or future State 2% upon its gross earnings from and after the day when the cars should commence running on any part of the road in the Territory or future State, such payments to be in lieu of, and the company to be exempt from, the payments of any other imposts, taxes or dividends, any law to the contrary notwithstanding. This was not a unilateral contract; that is to say, an offer made by one party to another to be accepted later by the performance of some act or condition. It was an agreement complete in itself with a valid consideration moving from each side. There could be no question about an unearned immunity from taxation. It is plain from the reading of the contract that while there might be subsequent grounds of forfeiture to be enforced by the State under certain conditions, yet until or unless such forfeiture took place, the charter fixed the rights of the parties definitely and finally from that time forward. The transaction took on a contractual character when the charter was granted and accepted, and not 30 years later when the line of road was completed. If this is not so, then the decision in the Dartmouth College case might as well never have been written.

Counsel for the State attempted with apparent success to bring the present case within the decision

in Planters' Fire & Marine Insurance Co. v. Tennessee, 161 U. S. 193, the argument being that inasmuch as the so-called immunity from taxation was not "earned" by the construction of the road until after the Constitution was adopted, the company's right to claim the so-called immunity became subject to the constitution and particularly to the amendment of 1871 and was therefore repealable. The case just cited does not support such a contention. There the facts were as follows:

An act had been passed by the legislature of Tennessee in 1860 incorporating the Energetic Insurance Co. of Nashville, with a proviso in the charter limiting its taxation to one quarter of one per cent of its capital stock. The corporators named in the act made no attempt to accept the charter and the company was not organized until 1884. Meanwhile in 1870 a new constitution was adopted by the State forbidding any such limitation of taxation as was contained in the charter. It was naturally held that the company did not acquire the right of exemption in question because at the time it was organized and the charter accepted, the constitution prohibited such exemption. The court said:

> "If the charter had been accepted and the individuals organized under it prior to the adoption of the constitution of 1870, then the exemption might have gone with it."

The distinction between that case and the one before this court is obvious.

In this connection, also, counsel cited the case of Pearsall v. Great Northern Ry. Co., 161 U. S.

646, where it was held that an unexecuted power to consolidate was not such a vested right as to prevent its repeal or withdrawal by the legislature. This decision instead of militating against our position reinforces it. The precise point involved was whether a power to consolidate with parallel and competing lines contained in the charter of the railroad company could be revoked by the State before it had been acted upon by the company. This court held that it could be revoked. Mr. Justice Brown, who wrote the opinion, was extremely careful to distinguish between an authorization of that character which was

> "unnecessary to the main object of the grant, and not directly and immediately within the contemplation of the parties thereto,"

and a power which

> "was so far necessary to the full enjoyment of the main object of the charter that persons subscribing to the stock might be presumed to take (it) into consideration."

If the authorization to consolidate with a parallel and competing line had been acted upon, the right would have become vested to that extent and could not afterwards have been revoked, but the court was of the opinion that in the absence of such action the State might revoke the power.

The view taken was that the authorization was nothing more than a revocable license, and, furthermore, that the very nature of the authority brought it within the police power of the State. Attention was directed especially to the fact that such powers of consolidation tended to monopoly and were con-

trary to public policy. In this regard the court said:

> "We think it was competent for the legislature, out of due regard for the public welfare, to declare that its charter should not be used for the purpose of stifling competition and building up monopolies. In short, we cannot recognize a vested right to do a manifest wrong."

The limits of the decision are well expressed in the following quotation:

> "But where the charter authorizes the company in sweeping terms to do certain things which are unnecessary to the main object of the grant, and not directly and immediately within the contemplation of the parties thereto, the power so conferred, so long as it is unexecuted, is within the control of the legislature and may be treated as a license, and may be revoked, if a possible exercise of such power is found to conflict with th interests of the public."

Manifestly there is a vast difference between such a power and a stipulation in a charter fixing the rate of taxation. That would clearly amount to a contractual obligation which would have a great "influence upon persons contemplating the purchase of its stocks or securities." The learned justice who wrote the opinion conceded that a stipulation in the charter with respect to the right of taxation would confer a vested right which could not afterwards be taken away. He said:

> "This court has had, perhaps, more frequent occasion to assert the inviolability of corporate charters in cases respecting the power of taxation than in any other, and in a long series of decisions has held that a clause im-

posing certain taxes in lieu of all other taxes, or of all taxes to which the company or stockholders therein would be subject, is impaired by legislation raising the rate of taxation, or imposing taxes other than those specified in the charter. Thus in State Bank of Ohio v. Knoop, 16 How. 369, it was held that, where, by a general banking law, it was provided that a certain percentage of dividends should be set off for the use of the State, and should be in lieu of all taxes to which the company or stockholders therein would otherwise be subjected, this was a contract fixing permanently the amount of taxation, and that legislation could not thereafter increase it. In this connection it was said by Mr. Justice McLean: 'Every valuable privilege given by the charter, and which conduced to an acceptance of it and an organization under it, is a contract which cannot be changed by the legislature where the power to do so is not reserved in the charter. The rate of discount, the duration of the charter, the specific tax agreed to be paid, and other provisions essentially connected with the franchise, and necessary to the business of the bank, cannot, without its consent, become a subject for legislative action.' To the same effect are New Jersey v. Wilson, 7 Cranch, 164; Gordon v. Appeal Tax Court, 3 How. 133; Dodge v. Woolsey, 18 How. 331; Jefferson Branch Bank v. Skelly, 1 Black, 436; McGee v. Mathis, 4 Wall. 143; Home of the Friendless v. Rouse, 8 Wall. 430; Wilmington Railroad v. Reid, 13 Wall. 264; Humphrey v. Pegues, 16 Wall. 244; Farrington v. Tennessee, 95 U. S. 679; New Jersey v. Yard, 95 U. S. 104; Asylum v. New Orleans, 105 U. S. 362. If, however, the charter contain a reservation of an unlimited power to alter, amend or repeal, the legislature may take away an immunity from taxation. Tomlinson v. Jessup, 15 Wall. 454."

On the same footing with the Pearsall case is that of Louisville & Nashville R. R. v. Kentucky,

161 U. S. 677, also relied upon by counsel for the State. The facts were very similar and it is unnecessary to state the case in detail. Referring to the Pearsall case, the court said:

> "We think, for the reasons stated in the Pearsall case, that under its police power the people, in their sovereign capacify, or the legislature, as their representatives, may deal with the charter of a railway corporation, so far as is necessary for the protection of their lives, health and safety of its passengers or the public, or for the security of property or the conservation of the public interests, provided, of course, that no vested rights are thereby impaired. In other words, the legislature may not destroy vested rights, whether they are expressly prohibited from doing so or not, but otherwise may legislate with respect to corporations, whether expressly permitted to do so or not. While the police power has been most frequently exercised with respect to matters which concern the public health, safety or morals, we have frequently held that corporations engaged in a public service are subject to legislative control, so far as it becomes necessary for the protection of the public interests."

As stated in another part of the same opinion, the rule governing both the Pearsall case and the Louisville & Nashville case is that:

> "Whatever is contrary to public policy or inimical to the public interests is subject to the police power of the State, and within legislative control."

Such a rule has never been applied to vested contract rights dealing with the subject of taxation. There is no public policy which prevents the sovereign power from contracting with a corporation for a fixed rate of taxation for the future.

The statement made by Mr. Justice Field in Picard v. Railroad Co., 130 U. S. 637, was in no way inconsistent with our position when applied to the particular facts appearing in that case. The charter in question there conferred the exemption from taxation "for the period of twenty years from the completion of its road." This is very different from conferring an exemption upon a corporation as such, and then proceeding to require the completion of the road within a given time. The distinction is somewhat analogous to that between a condition subsequent and a conditional limitation in the law of real property.

If the various provisions and stipulations contained in the incorporating acts of 1854 to 1856 had not been fully understood to form the basis of a valid and binding contract, the legislature would never have undertaken to make any reservation of a right to repeal, amend or modify under certain conditions, as was done by section 9 of the act of 1855.

The suggestion of the Supreme Court of Minnesota in the Great Northern case (106 Minn. 322; 119 N. W. 205), in substance that the court had never held in any previous case that the charter provisions of the old territorial charters constituted an irrepealable contract, is effectually refuted by the language of many of these previous decisions, as, for instance, the case of State ex rel. Marr v. Stearns, 72 Minn. 200, where the court stated its position as follows:

> "There is no decision of this court which holds that statutes of the state providing for the payment of a gross earnings tax by railway companies, and exempting their property from taxation in specie upon the basis of a cash valuation, were constitutional prior to their ratification by the amendment of 1871, Art. 4, § 32a. There is a clear intimation to the contrary in several cases, notably in those which follow the Parcher case, 14 Minn., 224 (297), sustaining the validity of territorial statutes providing for a gross earnings tax for the old land grant railway companies; that is, those which are organized under charters granted prior to the adoption of the constitution."

In the passage above quoted the court conceded that the gross earnings laws enacted prior to the adoption of the constitution amounted to irrepealable contracts.

Coming now to the question of forfeiture, it must be borne in mind that during all the many years when according to the State's present contention, and the ruling of the Minnesota court in this case, a contract did not exist because the act of building the line had not been performed, the state repeatedly recognized the existence of the charter and made not the slightest attempt to avoid it. The simple fact of the whole matter appears to be that the State had made a contract with the Minnesota & Northwestern Railway Company, or rather had inherited such a contract from the Territory. For a considerable period of time this contract could have been forfeited for non-acceptance of its terms. No move was made in this direction, and

consequently the contract stood and the inevitable presumption is that the State deliberately intended to waive any ground of forfeiture which may have existed, and deliberately intended to keep the agreement in full force and effect.

The provisions of a charter granted to a corporation and duly accepted are not forfeited by a mere failure to comply with its conditions. There must be some affirmative act of the legislature or the judgment of a court of competent jurisdiction in the nature of a forfeiture found. The provisions of the charter with respect to forfeiture are interesting. The first condition of forfeiture was contained in section 16 of the act of 1854, which provided that:

> "This act and all grants herein contained shall be void unless said company shall render to the governor of this territory"

certain statements and shall construct the road within the time therein limited. This section, however, was expressly repealed by section 3 of chapter 58 of the Laws of 1855, which, after providing for the repeal, requires the company to construct 50 miles of track between the point where it crosses the Mississippi river and the northern terminus of said road within six years, and also to build a telegraph line within a certain stated period. Section 4 of the act last mentioned provides as follows:

> "In case the said company shall fail to construct and complete the said fifty miles of railroad between the northern terminus thereof and the point where said road crosses the Mississippi river within three years from the passage of this act, or to construct and com-

plete the whole of the remainder of the said railroad within three years hereafter, or to construct and put in operation the said line of telegraph, within the time limited by this act, then, and in either of the said cases, this act, and the said act to which this is amendatory, and all grants contained in the said acts, or either of them, shall cease and be void and all the lands granted to the said company and then belonging to it, together with all its chartered rights and privileges, shall revert to the Territory of Minnesota."

The next amendment was section 1 of the act of 1856 (c. 47), which changed the time within which the road should be built. The only condition of forfeiture there mentioned is that the Governor shall declare by proclamation that the rights, franchises and privileges of the company shall be null and void, if it does not notify the Governor of the acceptance of the act of 1856. There is no condition for a forfeiture for a failure to build. The law of 1883 changed the route of the line which the company was authorized to build. Consequently we have this situation: By section 4 of the act of 1855, if the company failed to construct 50 miles of line between certain points within three years and the remainder within another definite period, all grants were to be void. By the act of 1856 the time was changed and extended without adding any condition of forfeiture for failure to build. Finally, in 1883 the route was changed without limitation as to time. Under these conditios it does not seem possible to say that there is any provision in the charter for a forfeiture upon failure to construct the road; but, however that

may be, in any event it would require an affirmative act finding and declaring the forfeiture to bring about that result. There is no question but that a grant of lands made upon conditions similar to the ones here involved could not be forfeited even after default, without an affirmative act on the part of the legislature making the grant.

Schulenberg v. Harriman, 21 Wall. 44;

Farnsworth v. Minn. & Pac. R. Co., 92 U. S. 49;

Minneapolis & St. Cloud Ry. Co. v. D. & W. R. Co., Dul. & I. R. Co., Intervener, 45 Minn. 104.

The same rule applies to any grant of rights and powers.

U. S. v. Minn. & N. W. R. Co., 1 Minn. (Original Ed.) 127;

Minn. & N. W. R. Co. v. Rice, 1 Minn. (Original Ed.) 358;

Application of B. E. R. R. Co., 125 N. Y. 434;

Foster v. Fitch, 36 Conn. 236;

Farnsworth v. Lime Rock Co., 22 Atl. 373;

People v. Bank, 1 Douglas (Mich.) 282;

B. & O. R. R. Co. v. Supervisors, 3 W. Va. 319;

Briggs v. Cape Cod Canal Co., 137 Mass. 71;

In re Petition of N. Y. Elevated R. R. Co., 70 N. Y. 327;

Farnsworth v. Minn. & Pac. R. Co., *supra;*

Chesapeake Canal Co. v. B. &c. Co., 4 Gil. & J. (Md.) 127;

People v. Ottawa Co., 3 N. E. 413.

In the case of Farnsworth v. Minn. & Pac. R. Co., *supra*, no distinction was made between the

grant of lands and the grant of chartered privileges, because the same act which granted the lands provided for a forfeiture of the chartered rights. The act provided:

> "And in case the company shall fail to construct the other and further portions of the road and branches within the time or times designated, it should forfeit to the state in like manner all property, estate and franchises pertaining to the unbuilt portions of the road and branches," etc.

The court held in substance that this was a condition subsequent, and that it would require an act of the legislature or a decree of court to forfeit the lands and franchises after default.

That there is no difference in this respect between a grant of lands and the grant of a franchise is apparent from the decision of the Supreme Court of Minnesota in the case of United States v. Minnesota & Northwestern R. Co., *supra*, where this identical charter was involved. The court said:

> "An interest in or right to lands, franchises, etc., once vested cannot be divested by any act of the grantor, unless by agreement of the parties to the grant.
>
> "Every grant of a franchise (says Judge Story) is necessarily exclusive, so far as the grant extends, and cannot be resumed or interfered with. The legislature cannot recall its grant nor destroy it. In this respect, the grant of a franchise does not differ from a grant of lands. In each case the particular franchise or particular land is withdrawn from legislative operation, and the subject matter has passed from the hands of the government."

In Briggs v. Cape Cod Canal Co., *supra*, it appeared that by section 3 of the act incorporating the company at least $25,000 was to be expended in the actual construction of the canal within four months from the passage of the act; otherwise the corporation was thereupon to "cease to exist." Section 19 of the same act provided that if $200,000 was not deposited by the company with the treasurer of the commonwealth for certain purposes, within four months from the passage of the act, the corporation was also to "cease to exist."

The bill alleged that neither of these provisions had been complied with, but neither the legislature nor the state in any suit had taken steps to have the charter forfeited. The court said:

> "It is too well settled to admit of discussion, that a corporation can be judicially determined to have ceased to exist only in a suit to which the Commonwealth is a party. The act of incorporation is a contract between the Commonwealth and the corporation; whether the corporation has complied with the conditions is a question of fact to be judicially determined. The Commonwealth may waive a strict compliance with the terms of the act, and may elect whether it will insist upon a forfeiture, if there has been a breach of condition. Commonwealth v. Union Ins. Co., 5 Mass. 230; Boston Glass Manufactory v. Langdon, 24 Pick. 49; Heard v. Talbot, 7 Gray, 113; Folger v. Columbian Ins. Co., 99 Mass. 267, 274; Rice v. National Bank of the Commonwealth, 126 Mass. 300; Angell & Ames on Corp., § 777."

In the case of the Application of the B. E. R. R. Co., *supra*, the Brooklyn Elevated Railroad Co. was incorporated by certain acts of the legislature of

the state of New York, which provided that the road should be commenced and completed within a certain time specified, and in default thereof, that "it should forfeit the rights acquired by said acts." It was admitted that the corporation had not complied with the act, but the court held that it was not thereby *ipso facto* dissolved. The court said (pp. 439, 440):

> "What was plainly meant is that the corporation should, in the event mentioned, forfeit its charter, and that including all the rights acquired by it under the acts from which it derived corporate existence; and thus the legislative meaning is the same as if the language used had been 'forfeit its charter' or its 'chartered rights.' For the non-performance of conditions specified, such language has never been held *ex proprio vigore*, to put an end to corporate life. By such nonperformance a corporation is not, *ipso facto*, dissolved or deprived of its corporate existence or corporate rights, but it is simply exposed to proceedings, on behalf of the state, to establish and enforce the forfeiture. The state which gave the corporate life may take it away. The state which imposed the conditions may waive their performance, and the corporate life may run on until the state, by proper proceedings, intervenes and enforces the forfeiture. Until the state does thus intervene, a private individual cannot set up the forfeiture or in any way challenge the corporate existence with its full vitality. The authorities for these views are numerous and uniform both in this country and in England."

In the case of B. & O. Railroad Co. v. Supervisors, *supra*, the law provided:

> "That if the said road shall not be commenced within two years from the passage of

this act and shall not be finished within the state in ten years from the commencement thereof, then this act shall be null and void."

The court held that although the charter might be subject to forfeiture, still, as the state of West Virginia did not step in and declare it forfeited, it continued to stand. The court said (pp. 323, 324):

"This quesion could not have been considered by the court, because the act of 1827 had been accepted and the company had become a corporation under it and had made its road as far as Cumberland before the passage of the act of 1847, so that although the charter was perhaps at the time of the passage of the act of 1847 forfeited, yet that question could only be raised by a proper proceeding in the name of the state against the company to judicially determine and declare the forfeiture and annul the charter. 2 Kent, Com., 393; the King v. Amery, 2 Term. Rep. 515; Canal Company v. Railroad Co., 4 Gil. & Johnson, 1; Thomas v. The People, 23 Wend. 535; Angell & Ames on Corporations, § 777; Crump, etc., v. United States Mining Company, 7 Grat. 352.

"Although a charter of an incorporated company may be forfeited, yet the government which granted the charter may not choose to enforce the forfeiture, and it seems that if the charter of the Baltimore and Ohio Railroad Company was in fact forfeited, as claimed by counsel, the state of Virginia did not choose to enforce such forfeiture."

The case of Minneapolis & St. Cloud R. R. Co. v. Duluth & Winnipeg R. Co., Duluth & Iron Range R. R. Co. Intervenor, *supra*, is a very strong case. The act of March 9, 1875, granted to the Duluth & Iron Range R. R. Co. certain lands, upon condition that it build the road within a certain time. Just

before this time expired, and in 1878, the legislature passed an act entitled "An Act to transfer the lands granted to the Duluth & Iron Range Railroad Company," and providing that said lands "be, and the same are hereby transferred and vested in the Duluth & Winnipeg Railroad Company." It was claimed that this was a declaration of forfeiture in the act itself, which, when default did occur, transferred the lands to the Duluth & Winnipeg Railroad Co.; but the court held to the contrary. The opinion is by Mr. Justice Mitchell, and on page 106 of the opinion, he says:

> "By reference to the act of March 9, 1875, it will be seen that the grant to the intervenor is what is familiarly known as a grant *'in praesenti'* upon conditions subsequent. It is elementary law that such a grant is not forfeited by mere default of the grantee in the conditions, but only by some affirmative act of the state, after the breach or default, declaring or asserting the forfeiture. The right of the state to a forfeiture must be asserted by judicial proceedings, the equivalent of an inquest of office at common law, finding the fact of forfeiture, and adjudging a restoration of the estate on that ground; or there must be some legislative assertion of ownership of the property for the breach of the condition; and until this is done the grant remains vested in the grantee, notwithstanding the breach of the condition. Moreover, if, after the breach, the grantee proceeds and earns the grant by the construction of the road, before any action on the part of the state asserting or declaring a forfeiture, the state cannot afterwards divest the grantee of the land by declaring a forfeiture. These propositions as applied to land grants have become so familiar, especially since the decision in Schulenberg v. Harriman, 21

Wall. 44, that a discussion of them, or a citation of authorities in their support, would be worse than useless. The intervenor was not in default in any of the conditions of its grant in March, 1878, or for nearly a year afterwards. In 1879 it did default, not having, as the court finds, located its line, or filed a map of it, until the spring of 1882. But the state never declared or asserted any forfeiture, either by legislative act or by judicial proceedings, and in the meantime the intervenor has gone on and earned its grant by the construction of its road, so that it is now beyond the power of the state to declare a forfeiture. It is not, and cannot be, claimed that the act of 1878 amounted to a legislative declaration of forfeiture, because at the time of its passage there had been no default or breach on the part of the intervenor. It follows that the grant of 1875 has never been forfeited, but is still vested in the intervenor."

III.

ANY DEFAULT ON THE PART OF THE RAILWAY COMPANY WHICH MAY HAVE EXISTED AS A GROUND OF FORFEITURE WAS WAIVED BY THE STATE.

Both upon principle and on authority there can be no doubt that the acts of 1872 and 1883 constituted an implied waiver of any ground of forfeiture which the State may have had. The act of 1872, it will be remembered, distinctly recognized the company and authorized it to change its name. The act of 1883 not only authorized a change of location of the line, but also authorized the company to consolidate its "stock, franchises, rights and property with any other railroad company." The authorization as to changing the location of the line was without any limit as to time to build.

The right in the State to forfeit a charter is one which exists, if at all, for the benefit of the State alone. It may or may not enforce the forfeiture according as it is deemed advantageous or otherwise to do so. Hence it is universally recognized that the right to forfeit may be waived. Of course the clearest possible method of effecting a waiver is by recognizing the existence of the corporation notwithstanding the default. The State of Minnesota did this and within all of the decisions such action amounted to an effective confirmation of the charter and a waiver of any ground of forfeiture which may have arisen prior to the passage of the respective acts above mentioned. We refer in this connection to the following authorities:

Foster v. Fitch, 36 Conn. 236;

Farnsworth v. Lime Rock Co., 22 Atl. 373;

In re Petition N. Y. Elevated R. Co., 70 N. Y. 327;

Canal Co. v. R. R. Co., 4 Gil. & J. (Md.) 1.

In Foster v. Fitch, *supra*, the charter of a corporation provided that if it should not expend the sum of $100,000 within three years from the passage of the act, or if it should not construct the road or any portion of it within five years from the passage of the act, "then this act shall be null and void." Just as the charter was about to expire by this limitation, the legislature passed another act authorizing the company to issue bonds guaranteed by the city, such bonds to run for a long period and to be delivered from time to time. The court held that this later act practically wiped out all of the provisions by way of limitation and confirmed the charter without them. The opinion is brief and we quote it in its entirety:

> "We are all satisfied that the act of July 3d, 1869, continued the charter of the railroad company for an indefinite period of time, notwithstanding the provision in the ninth section of their charter, requiring the company to construct their road within a specified time, or the charter should become void; and notwithstanding that the company failed to comply with that requirement.
>
> "What construction should be given to that provision of the charter it is unnecessary to determine; therefore we leave it without consideration.
>
> "The time limited for the construction of the road was within six days of expiring when the act of July 3rd was passed, and a large amount

of work remained to be done on the road, so much that it was impossible to finish it within the time prescribed.

"The work was a public one. The state had authorized the company to construct the road for the public use; and the state must be regarded as having knowledge of the progress of the work, and what remained to be done when the act was passed, and the time limited for its completion. The state also must have known that the object of giving the bonds which the city of New Haven proposed to guaranty, was to raise money to complete the road.

"The amount authorized to be raised was two hundred and twenty-five thousand dollars.

"A much longer time than six days would ordinarily be required to raise so large an amount of money, to say nothing of the time necessary to prepare the bonds and execute the instruments required to be given.

"The delivery of the bonds to the company after the guaranty of the city was endorsed upon them, was required by the vote of the city to be done from time to time, after the company had sold all their first mortgage bonds that remained undisposed of, and the proceeds had been expended in the construction of the road.

"The act required that the interest of the bonds should be made payable semi-annually, and the guaranty of the city secured by mortgage; thereby showing that the bonds were designed to run a considerable period of time.

"Can it be supposed that these provisions, rendering a much longer period of time than six days necessary for their consummation, were intended never to be realized—never to have any practical effect?

"If the claim of the petitioner is correct, that the charter of the company expired on the 9th day of July, then the legislature was engaged in a work of folly in legislating for a company destined to extinction in six days thereafter, without the possibility of enjoying any

of the benefits attempted to be conferred upon them.

"Of what possible advantage to this company were these provisions, if this claim is true, and what object could the legislature have had in view, in passing them?

"Suppose the bonds could have been issued and the money obtained upon them within the six days, what condition would the city have been in, guaranteeing the bonds of a company defunct as soon as the guaranty was given and the money obtained?

"The legislature could not have intended such a result. When they authorized the railroad company as a corporation to issue bonds with interest at seven per cent. per annum, payable semi-annually, they authorized the company as a corporation to pay them at maturity according to their tenor. The authority to issue such bonds as a corporation necessarily involves authority to pay them at maturity as a corporation. The authority to pay them as a corporation necessarily involves authority to exist as a corporation at the time of payment.

"We think it is clear that the statute of July 3d by necessary implication continued the charter of the company in full vigor for an indefinite period of time. It makes no allusion to the non-completion of the road, a fact which was notorious. It contemplates the existence of the company for an indefinite period of time, and in absolute terms authorizes them as a corporation to perform a series of acts that in the ordinary course of events would require years for their accomplishment.

"We think it is clear that the act repeals the ninth section of the charter by necessary implication. That section had performed all the good it could accomplish. The road was far advanced in its completion. It was for the benefit of the state that it should be completed. No good could result from its non-completion, and the act in question intended that it should be completed.

> "We therefore advise the Superior Court that the petition is sufficient in the law."

In Farnsworth v. Lime Rock Co., *supra*, it was decided by the Supreme Court of Maine that the original charter of the company in question was to become void for non-acceptance within a definite time therein stated. Subsequently, and after the default had occurred, the company amended the charter and it was held that such amendment constituted a waiver of the right to forfeit for non-acceptance. The court said:

> "A further objection urged against the validity of the charter is that the company was not organized within four years after the date of its incorporation, forfeiture following for such lapse of the provisions of Rev. St. c. 1, § 6, art. 26. The answer is that the legislature waived forfeiture by the amendments which it granted."

In the matter of the petition of New York Elevated Railroad Company, *supra*, the incorporating act of the company required the construction of certain portions of the road within a certain time, and provided that upon failure so to build, the charter should be forfeited. The continued existence of the corporation was recognized by subsequent acts, notwithstanding the default. The court said:

> "These provisions were probably not complied with. They were conditions for a non-compliance with which the sovereign power could claim a forfeiture of the company's charter. But a cause of forfeiture cannot be taken advantage of or enforced against a corporation collaterally, or incidentally, or in any other mode than by a direct proceeding for

> that purpose against the corporation; and the government creating the corporation can alone institute the proceeding; and it can waive a forfeiture, and this it can do expressly or by legislative acts recognizing the continued existence of the corporation. (Angell & Ames on Corp., 742-47.)"

In Canal Company v. Railroad Co., *supra*, the Maryland court had under consideration the charter of the Baltimore & Ohio R. Co., hereinbefore mentioned. The following abstract from the opinion is an emphatic endorsement of the principles for which we contend:

> "The charter was not limited in its duration, but expressly made perpetual by its terms, defeasible only on failure by the corporation to accomplish within the time limited what was required to be done by the 18th section. Which was a condition subsequent engrafted upon it, in defeasance of a vested franchise, on a breach of which, if in point there was any act of forfeiture committed by the corporation, it might have been avoided, or forfeited, by *scire facias*, or a *quo warranto*, if the states that granted it had chosen to take advantage of the non-performance of the condition. But not having done so, the franchise endured notwithstanding the breach of the condition. And it is like the grant of an estate in land, defeasible on the non-performance of a condition subsequent, strictly speaking, as if an estate be granted expressly upon condition to be void on the happening of a certain event. In such a case it is perfectly clear, that the estate is not defeated by the mere happening of the event, but the law permits it to continue, beyond the time when such contingency happens, unless the grantor or his heirs take advantage of the breach of the condition by entry, etc., which cannot be done by a

stranger. The proceeding by the government (the grantor) for the breach of a condition subsequent, contained in a charter of incorporation, is by *scire facias*, or *quo warranto;* by an individual grantor (or his heirs) of land, by entry.

"A private corporation aggregate may be dissolved, by the death of all its members, or by the loss of an integral part whereby it is rendered unable to do any corporate act, or to restore itself by a new election; or a corporation may be dissolved by a surrender to the government of its franchise, or by an act of the legislature repealing the act of incorporation, with the assent of the corporation; or it may be dissolved by a forfeiture of its charter, through abuse or neglect of its franchises, as for condition broken; there being a tacit condition in every such grant that the corporation shall act up to the end of its institution. But such forfeiture must be judicially ascertained and declared, upon direct proceedings against the corporation for that purpose, in order that it might not be condemned unheard, for an imputed delinquncy. Where there is no corporate body in existence, as where it has been dissolved by the loss of an integral part, or by surrender, etc., it would be not only useless, but absurd to go into a court of law to obtain a judgment of dissolution, but where there is an existing corporation capable of acting, but which has been guilty of an abuse, or neglect of its franchises, or the powers committed to its trust, amounting to a cause of forfeiture, such cause of forfeiture can only be enforced by *scire facias* or a *quo warranto*, issued at the instance of the government creating the corporation, and cannot be taken advantage of incidentally, or in any other way, or by any individual; since the government, with which alone the contract arising out of the charter is made, may waive the breach of any condition of that contract, and cannot be made to enforce the forfeiture, whether it will or no.

> and when it may have sufficient reason for not choosing to do so. Until it does, and that by judicial action and not by legislation no individual or other corporation can treat it as a forfeited franchise. This is the doctrine taught by the authorities—among which are, The King v. Amery, 2 Term. Rep. 515; The King v. Pasmore, 3 Term. Rep. 199; Terret v. Taylor, 9 Cranch, 43; Dartmouth College v. Woodward, Wheat. Rep. 518; Slee v. Bloom, 5 John. Ch. Rep. 366; Same v. Same, 19 John. Rep. 456; The Trustees of Vernon Society v. Hill, 6 Cowan's Rep. 23; McLaren v. Pennington, 1 Paige's Rep. 102; and Angell and Ames on Corporations."

Subsequently there was other legislation which enlarged and regulated the powers of the railroad company, and the court held that this was an implied recognition of the existence of the corporation.

IV.

THE CONTRACT FOR A COMMUTED SYSTEM OF TAXATION WAS APPURTENANT TO THE LINE OF ROAD EVENTUALLY CONSTRUCTED AND DULY PASSED TO THE PLAINTIFF-IN-ERROR AS THE SUCCESSOR OF THE MINNESOTA & NORTHWESTERN RAILROAD COMPANY.

The next contention made in behalf of the State, and approved by the Minnesota court in its decision, is that the charter provision for a commuted system of taxation was personal to the Minnesota & Northwestern R. R. Co. and could not be transferred to any other corporation. This argument is made, as we shall show, in the face of a long line of decisions by that court directly to the contrary.

It is stated that the court "has never held the gross earnings system of taxation at a given rate to be appurtenant as a contract right to any line of road, irrespective of the lands granted to induce the building of that line." From a consideration of two of the many cases which had come before the court in the past forty years, counsel arrived at the conclusion that, under the decisions, the right or immunity is regarded as "appurtenant to the lands and not to the lines." This seems to have been accepted by the Supreme Court of Minnesota, judging by its language in the Great Northern case, on page 209 of the report in 119 N. W. We expect to show that the court in its previous decisions had never attempted to make any such distinction as the one suggested. It is entirely fanciful, had apparently never been suggested before, and would

lead to manifestly absurd results. No reason whatever has been suggested why such a distinction should prove salutary in practice or sound in point of law

It was also claimed in the court below by counsel for the state that, while the commuted system of taxation might be applicable to some successors of the original company, it must be limited to those successors who assumed the completion of the road. We cannot find that any court has ever consciously undertaken to make such a distinction. Such a rule would be obviously difficult to construe or enforce in practice, and is not at all consonant with the reasoning adopted by the Minnesota court throughout its long line of decisions in question. Under the idea thus advanced no man could tell at the time of investment in the securities of the original company, how long the commuted system of taxation would prevail or to how many of the company's successors, if any, it might extend. If no transfer of the road was ever made after its completion, then the exemption would probably last throughout the entire term of the charter. On the other hand, any transfer after completion of the road would *ipso facto* avoid the contract.

We are confident that an examination of the court's former opinions on this subject will effectually put to rest these contentions, which are really only a very strained attempt to take from under the operation of a well known rule a case which clearly falls within its scope.

We shall refer particularly to the following cases:

State v. Luther, 56 Minn. 156;

St. Paul & Pac. Ry. v. Parcher, 14 Minn. 297;

Stevens v. St. Paul, M. & M. Ry. Co., 36 Minn. 467;

State v. Winona & St. Peter R. Co., 21 Minn. 315;

Chicago, Mil. & St. P. Ry. v. Pfaender, 23 Minn. 217;

City of St. Paul v. St. Paul & Sioux City R. Co., 23 Minn. 469;

County of Nobles v. Sioux City & St. P. R. Co., 26 Minn. 294;

State v. Northern Pacific R. Co., 32 Minn. 294;

Traverse County v. St. Paul, M. & M. Ry., 73 Minn. 417.

For convenience we have classified these decisions under heads referring to the various railroad charters involved:

A. St. Paul & Pacific Railway Company.

The leading authority on this whole subject is the first case which arose in that connection, First Division of the St. Paul & Pacific Ry. Co. v. Parcher, *supra*. By an act of the territorial legislature appearing as Chap. 1 of the Special Laws of 1857, the Minnesota & Pacific Railway Co. was incorporated and given a grant of lands. Section 18 of this law provided as follows:

> "In consideration of the grants, privileges and franchises herein conferred on the said Minnesota & Pacific Railroad Company, the said company shall and will, on or before the first day of March, in each year, pay into the treasury of the Territory or future State, three

per centum of the gross earnings of the said railroad, for the year ending on the last day of the preceding December, in lieu of all taxes and assessments whatever; and for the purpose of ascertaining the said earnings an accurate account shall be kept by said company of all receipts and expenditure on account of the operation of said railroads, and abstracts thereof, shall be furnished by said company to the treasurer of the Territory or State, on or before the first day of February in each year, the truth of which shall be verified by the affidavits of the secretary and treasurer of said company; and for the purpose of ascertaining the truth of said affidavits and the correctness of such abstracts full power is vested in the governor, or any other person appointed as may be by law prescribed, to examine the books and papers of said company, and to examine under oath the officers, agents and employes of said company, and other persons, and if any person so examined by the governor or other authorized person, shall knowingly and wilfully swear falsely concerning the matters aforesaid, every such person is hereby declared to have committed perjury; and for securing to the Territory or State the payment of the aforesaid per centum, it is hereby declared that the State shall have a lien upon the railroads of the said company, and upon all other property, estate and effects of the said company, whether real, personal or mixed, and the lien hereby secured shall take and have precedence of all demands, decrees and judgments against the said company. The first payment shall be made on the first day of March next after fifty miles of said railroad shall be completed, and such payment shall be in lieu of all taxes and in full of all claims of the Territory or State for the grant hereby made, and in consideration of such annual payments the said company shall be forever exempt from all assessments and taxes whatever by the Territory or State which shall succeed

the Territory, or by any county, city, town, village or other municipal authority in the Territory or State upon all stock in the said 'Minnesota & Pacific Railroad Company,' whether belonging to said company or to individuals, and upon all its franchises or estate, real, personal or mixed, held by said company, and said land granted by said act of Congress hereby authorized to be conveyed to the said Minnesota & Pacific Railroad Company shall be exempt from all taxation till sold and conveyed by said company."

By the constitutional amendment of 1858 the State was authorized to loan its credit to this company and receive a mortgage upon its road, lands and franchises. (General Laws 1858, p. 11.) The mortgage was duly made.

By another act of the legislature passed in the same year (General Laws 1858, c. 72, p. 178), it was provided that in and by the sale under the mortgage, the party or parties acquiring title should exercise and enjoy thereafter "all and the same rights, privileges, grants, franchises, immunities and advantages in and by said mortgage and deed of trust enumerated and conveyed which belonged to or are enjoyed by the company making such deed or mortgage."

By a subsequent act of the legislature the governor was directed to foreclose the mortgage. This was accordingly done and the road was bid in by the State.

By later acts the property was restored to the Minnesota & Pacific Company upon certain conditions which were never complied with. Thereupon the St. Paul & Pacific Railway Company was duly

organized under an act passed in 1862 (c. 20, Laws of 1862, p. 248). Section 2 of this act conferred on the new company "all the rights, privileges, franchises, lands, property and interests granted by the Territory of Minnesota to the Minnesota & Pacific Railroad Co."

By act of Feb. 6, 1864 (Special Laws 1864, c. 3, p. 174), the St. Paul & Pacific Co. was authorized to create and issue classes of stock for particular divisions of its line; or, in other words, practically to make a separate corporation of the different divisions. Under this statute a contract was made with one Litchfield and others for the construction of the "First Division of the St. Paul & Pac. Railroad," and Litchfield and others organized the First Division. By the contract they were vested with all "rights, benefits, property, franchises, powers and interests of the St. Paul & Pacific Railroad Company."

For the point we are making it is sufficient to say that the First Division of the St. Paul & Pac. Railroad Co. claimed an exemption from taxation of its lands on the ground that the provisions of the law of 1857 constituted an irrevocable contract.

It was claimed that the State had not the power to grant such a contract, and conceding that it had, that the contract of commuted taxation contained in the original charter did not pass to the St. Paul & Pac. Co., or to Litchfield under the various laws and contracts already referred to.

The court held that the Territorial Legislature had the power to grant this contract, that it passed

to the St. Paul & Pacific Company, and from that company to Litchfield and Company and vested in the First Division of the St. Paul & Pacific Co. by reason of their organization of that company. The court said (14 Minn., pp. 329-332):

> "We are, however, of opinion that this privilege or immunity in reference to taxation is in no greater degree personal to the Minnesota & Pacific Railroad Co. than any other of its rights or franchises. All the franchises and rights conferred upon the company were granted for the benefit of the company, and in that sense were all personal. But we perceive nothing in the language employed in reference to this right, privilege or immunity to distinguish it in this respect from the other rights granted. It would certainly be one of 'the privileges, grants, franchises, immunities and advantages' the sale and transfer of which is authorized by the provisions of § 21 of the original charter of the company.
>
> "But if this immunity in regard to taxation be not a franchise, in the legitimate meaning of the word, it certainly was, as we have already determined, a right and a contract right, to hold the lands exempt from taxation, until the same were sold and conveyed. And as it was not a personal and inalienable right, there is no reason why it should not pass with the lands and as appendant thereto to the State. When the Minnesota & Pacific Railroad Company lost the lands, it lost this right, for it had lost that to which the right related. The question then is, what became of the right? The State took and held what it acquired, not in its sovereign character, but as property, like a private individual, and in this capacity it succeeded to the roads, lands and franchises of the company, and in our opinion to this immunity from taxation, as appendant to the lands. If this was not the case, then this immunity was merged or extinguished. That

it was not the intention or interest of the state to suffer it to be merged or extinguished but to hold and transfer it for the purpose of facilitating and hastening the construction of the road is, we think, apparent for the reasons which we have before advanced for the purpose of showing that the state took, held and transferred the corporate and other franchises of the company unmerged and unextinguished.

"In addition to what was there said, it is entirely proper for us to refer to the state of things existing when the policy to be adopted was under consideration by the legislature. The State was then almost a wilderness. Its population was small and sparse, its capital limited, its business depressed, its resources undeveloped. There was not a mile of railroad within its borders. An outlet by rail for the products of the state was a matter of prime and presssing necessity. The inducements which we were able to hold out to secure this outlet, and the construction of needed lines of railway consisted rather in what the state was to be, than in what it was. The country at large had hardly recovered from the financial revulsion of 1856-7. How soon railroads in this state would prove remunerative to their owners as well as how soon the lands would sell, were matters of conjecture and experiment. And notwithstanding repeated and continued tenders of all roads, lands and franchises together with the privileges and exemptions in regard to taxation, it was not until the summer of 1862 that the first ten miles of railway were put into operation in this state. These facts are not without weight in considering whether the grant of lands without the exemption from taxation would probably have induced capital to undertake the construction of the road, especially when we take into account the proverbially high rate of taxation in newly settled communities.

"They have, as we think, a tendency to show that it was for the interest of the state to hold

this exemption unmerged that it might be enabled to offer it to persons willing to embark in these important enterprises, and thus secure the completion of the same.

"The state then having acquired this immunity from taxation transferred it with the lands to the St. Paul & Pacific Railroad Co., and thereupon that company became entitled to hold such lands exempt from taxation until the same were sold and conveyed by it. From the views before expressed this consequence follows whether the immunity be regarded as a franchise, or as a right appendant to the land and not a franchise. The St. Paul & Pacific Railroad Company thus holding this immunity when the legislation and arrangement were consummated, under which the 'First Division of the St. Paul & Pacific Railroad Company' became a corporation, and possessed of the lands, franchises and other property acquired as we have before seen through the same, it acquired this immunity also. There is not in our opinion, a sale and conveyance of the lands within the meaning of § 18 of the original charter. The lands are still held by the same body corporate which holds and exercises the corporate and other franchises pertaining to that portion of the road and branch to which the lands to which this action relates, are applicable. This same body corporate is carrying on the enterprise and constructing and operating the road and branch for which the lands were granted, and the immunity from taxation conferred. The transaction between the St. Paul & Pacific Railroad Company and the holders of the preferred and special stock was not a sale but rather in the nature of a division or partition of common property."

It may be noticed here, that by Chapter 6 of the Special Laws of 1865, p. 40, the time for the completion of the St. Paul & Pacific Road was extended, and the contract for commuted taxation was so

amended as to make it 1% for 3 years, 2% for 7 years and 3% for the balance of the time.

Subsequently, the First Division of the St. Paul & Pacific Road was mortgaged, default was made upon this mortgage, foreclosurfe was had and the property was bid in by the St. Paul, Minneapolis & Manitoba Railway Co. in 1879. After this sale the legislature passed an act (Special Laws of 1881, c. 412) affirming the sale to the Manitoba Company.

In the case of Stevens v. St. Paul, Minneapolis & Manitoba Ry. Co., 36 Minn. 467, the court said (pp. 470, 471):

> "That the exemption from ordinary taxation, created in 1857 in favor of the Minnesota & Pacific Railroad Company, subsequently passed with the lands, and as a right appendant thereto, to the St. Paul & Pacific Railroad Company and to the First Division of the St. Paul & Pacific Railroad Company, may be now accepted without question. It was so decided 18 years ago in the case of the last named company v. Parcher, 14 Minn. 224 (297), which decision has been ever since followed. State v. Winona & St. Peter R. Co., 21 Minn. 315; Minnesota Central Ry. Co. v. Melvin, Id. 339; Chicago, Mil. § St. Paul Ry. Co. v. Pfaender, 23 Minn. 217; City of St. Paul v. St. Paul & Sioux City R. Co., Id. 469, 475; County of Nobles v. Sioux City & St. Paul R. Co., 26 Minn. 294 (3 N. W. Rep. 701); State v. Northern Pacific R. Co., 32 Minn. 294 (20 N. W. Rep. 234). In the Parcher case, *supra*, the doubt was expressed as to whether the granted immunity from taxation was a franchise of the Minnesota & Pacific Company which after resumption by the state, had been included as such in the franchise reconferred upon the St. Paul & Pacific Company. The decision in that

> case was not put upon that ground, but its correctness has received support from a late decision of the Supreme Court of the United States declaring an immunity from taxation to be a franchise. Given v. Wright, 117 U. S. 648 (6 Sup. Ct. Rep. 907). We are not disposed to consider a question so long settled, and so often recognized as settled, in this court; and will only add that we do not think that the decision in the Parcher case, sustaining the exemption in favor of the successors of the Minnesota & Pacific Railroad Company has been disturbed by the decisions of the Supreme Court of the United States."

Counsel for the State in the Court below commented upon the fact that in the case last mentioned the court said:

> "By the admitted facts it appears that the exemption passed from the First Division of the St. Paul & Pacific Company to the Manitoba Company."

An examination of the record in the case shows that the admissions in question were in the exact language of the acts of the legislature and of the mortgages of the company. The court did apparently forbear to consider whether the contract of exemption passed or not; but, however that may be, this question has been considered and passed upon in so many other cases that the matter is of little consequence.

B. Winona & St. Peter Railroad.

In State v. Winona & St. Peter Railroad Co., *supra*, the facts were as follows:

The Transit Railroad Company, predecessor of the Winona & St. Peter Railroad Co., was organ-

ized under a territorial act approved March 3, 1855. It received a grant of lands under the omnibus law heretofore mentioned, chapter 2 of the Laws of 1857. Section 4 of that act provides for a tax of 3% upon gross earnings.

> "§ 4. The said lands so granted shall be and are exempted from all taxation until the same shall have been sold and conveyed by said company. In consideration of the grant of land and other franchises and privileges hereby confirmed in and conferred on the Transit Railroad Company, the said company shall pay into the treasury of the Territory or State of Minnesota three per cent upon all the gross earnings of said road, the amount of the gross earnings to be ascertained by the verified statement of the President and Treasurer of said company as hereinbefore provided for; and the said three per cent shall be so paid into the treasury of the Territory or future State of Minnesota within sixty days after any portion of the said road shall be operated and annually thereofter; and the same, when paid, shall be in lieu of all taxes whatever."

The Transit Company made default and the State foreclosed. By virtue of chapter 9 of the Special Laws of 1862, all of the rights, property and franchises of the company were conveyed to William Lamb and others, under the name of the Winona & St. Peter Railroad Company. The history of this transaction will be found in the case of Huff v. The Winona & St. Peter Railroad Co., 11 Minn. 114.

The question involved in the principal case under discussion was, whether in view of the constitutional provision "that laws shall be passed taxing

all real and personal property at its true value in money," the legislature could transfer to the Winona § St. Peter Co. the immunity from direct taxat'on contained in the original charter of the Transit Company. On this point the court said (pp. 316-318 of the Opinion):

> "By § 4 sub-chapter 2, of the act of May 22, 1857, it is enacted that the lands granted by said act to the Transit Railroad Company 'shall be and are exempted from all taxation, until the same shall have been sold and conveyed by said company.' For an account of the manner in which the Winona & St. Peter Railroad Co. in accordance with the doctrine of First Division of the St. Paul Pacific R. Co. v. Parcher, 14 Minn. 297, succeeded to the 'rights, benefits, privileges, property, franchises and interests,' of the Transit R. Co. it will be sufficient to refer to the case of Huff v. Winona & St. Peter R. Co., 11 Minn. 114; and it follows from this fact of successorship that the lands to which the present proceeding relates, being exempt from taxation, were illegally taxed, this case being ruled by First Div. St. P. & P. R. Co. v. Parcher. It is, however, contended by the attorney general that, in the case against Parcher, this court was not called upon to consider, and did not pass upon the question raised by the constitutional requirement that 'laws shall be passed taxing * * * all real and personal property at its true value in money,' and further that this constitutional provision in effect prohibited and rendered void the transfer by law passed after the adoption of the constitution, of the immunity from taxation which was originally conferred upon the Transit Company, and which is now claimed by the Winona & St. Peter Company as its successor. It is true that this constitutional provision does not appear to be considered in the opinion of this court in the case

referred to. But the consideration and disposition of the point made upon it, is involved in what is said (on pages 328, 331 of the published opinion), to the effect that it is by virtue of the amendment to the constitution that this immunity from taxation (whether it be regarded as a franchise, or as a right appendant to the lands to which it related), was permitted to be made the subject of the mortgage and forfeiture of the state, and was therefore transferable to the purchaser at the mortgage sale, or to the state under a forfeiture, and also by what is further said in the opinion in reference to the right of the state to hold and transfer whatever it acquired as purchaser at the foreclosure sale, or by virtue of the foreclosure, as property, as a private person might hold and transfer the same, without merger or extinguishment of any of the franchises, rights or immunities possessed by the mortgagors, and which had become the subject of mortgage or forfeiture, under the provisions of the constitutional amendment. In other words, the constitutional amendment, popularly known as the Five Million Loan Amendment, is controlling in reference to its subject. It is not a mere act of the legislature, but a part of the organic and fundamental law, of equal authority, *per se*, with any other part of the constitution. Being a particular provision, with reference to a particular subject-matter, it is, within its own sphere, so far as that subject-matter is concerned, paramount and supreme. And it follows that its effect in permitting the state, by the foreclosure or forfeiture, to acquire, hold and transfer the immunity from taxation, according to the doctrine of the Parcher case, is not controlled or overridden by the general constitutional provision in regard to taxation before quoted. In reference to the case of Trask v. Maguire, 18 Wall. 391, we think it may be distinguished in some important respects from the case at bar; but if it be in point, we should not deem it to be our

duty to recede from or overrule the views expressed from the Parcher case, upon its authority.

"Our conclusion is that the judge of the court below was right in determining that the lands to which the proceeding relates were illegally taxed, and in discharging the same from the taxes assessed upon them, and the attendant costs and penalties, etc. His decision is accordingly affirmed."

C. Minnesota Central Railway.

The predecessor of this company received a grant of lands under chapter 3 of the Laws of 1857 for the construction of a road from St. Paul via Mendota and Faribault to the southern boundary of the Territory. Section 9 of the act exempted the lands from taxation and provided for a commuted system as follows:

"§ 9. The said lands so granted shall be and are exempt from all taxation until the same shall have been sold and conveyed by said companies. But so soon as the said companies shall have respectively constructed, equipped and put in operation fifty miles of railroad for the transportation of freight and passengers, the said companies shall severally pay into the treasury of the Territory or State of Minnesota, in lieu of all taxes whatsoever, upon the property of said companies respectively the sum of three per cent per annum on the gross earnings of each of the said roads; said gross earnings to be ascertained by a statement under the oaths of the president and treasurer of each of the said roads, which statement shall be filed on or before the first day of January in each year in the office of the governor of the Territory or future State of Minnesota, said payments to be made annually, within sixty days after the filing of the statements aforesaid, and the governor

> shall have the right to appoint a commission to examine the books and accounts of said company at any time."

The usual mortgage was given to the State. Upon failure of the road to build within the time limited, there was a foreclosure, and later, pursuant to chapter 17 of the Special Laws of 1862, "all the rights, benefits, privileges, property franchises and interests" of the company acquired by the State were conveyed to Alexander Chambers and others under the name of the Minneapolis Faribault & Cedar Valley Railroad Co.

By § 6 of this act the commuted system of taxation was changed and the lands were exempted until sold or contracted to be sold.

Chapter 2, Special Laws of 1864, changed the name of the company to the Minnesota Central Railroad Company and certain additional powers were conferred.

Subsequently the Minnesota Central Co. conveyed its railroad to the McGregor & Western Railway Co. It was contended that this conveyance carried the lands and hence that they were taxable. The Court held to the contrary, citing and reaffirming First Division St. Paul & Pac. R. Co. v. Parcher, *supra;* Minnesota Cent. Ry. Co. v. Melvin, 21 Minn. 339.

D. Chicago, Milwaukee & St. Paul Railway Company.

The question was again before the Supreme Court of Minnesota in Chicago, Mil. & St. Paul Ry. Co. v. Pfaender, 23 Minn. 217. The

lands involved were a part of the grant made to the old Minnesota & Pacific Co. by chap. 1 of the Special Laws of 1857. After foreclosure of the mortgage and conveyance of the properties to the St. Paul & Pacific Co., a branch of the latter company was organized under the name of St. Paul & Chicago R. R. Co. It constructed the road from St. Paul to Winona. Subsequently the St. Paul & Chicago Co. sold its line to the Chicago, Milwaukee & St. Paul Ry. Co., being authorized thereto by chap. 93 of the Special Laws of 1872. Section 1 of the law reads as follows:

> "§ 1. That the Milwaukee & St. Paul Railway Company, having acquired by purchase the line of railroad extending from the city of St. Paul to Winona and La Crescent, which purchase is evidenced by the deed of the St. Paul & Chicago Railway Company, bearing date the third day of January A. D. 1872, and duly recorded in the office of the secretary of state of this state, they, the Milwaukee & St. Paul Railway Company may use and exercise within this state all the rights, privileges and franchises which have been heretofore or which shall hereafter be conferred on the St. Paul & Chicago Railway Company or upon the St. Paul and Pacific Railroad Company, appertaining to the use, operation or construction of said line of railroad between the city of St. Paul and the south line of this state, including the right to borrow money and to give mortgage or trust deeds as security for the payment thereof, and they, the Milwaukee & St. Paul Railway Company, shall be subject to all the duties and liabilities heretofore imposed upon said St. Paul & Chicago Railway Company, or upon the St. Paul & Pacific Railroad Company, relating to the line of railroad purchased by the Milwaukee & St. Paul Railway Company. Pro-

vided, that the rights, privileges and franchises conferred by this section upon the Milwaukee & St. Paul Railway Company shall refer and apply only to the line of road of the said St. Paul & Chicago Railway Company purchased and which purchase is hereby confirmed."

The conveying clause of the deed is in the following language:

"Indenture made January 1st, 1872, between the St. Paul & Chicago Railway Company and the Milwaukee & St. Paul Railway Company. Grants, bargains, sells, remises, releases, aliens, enfeoffs and confirms to ....., its successors and assigns forever the line of railway of ..... described ...., with all lands and real estate used for railway purposes at and between the points above named, and all rails, fixtures, stations, depots, etc., and all rights and franchises of every description of the party of the first part appertaining to the said line of railway from ..... to ..... necessary or requisite in the operation of the same, reserving herefrom all lands not used for railway purposes owned or to be owned by the grantor, donated by the United States, or by the State of Minnesota," etc.

Following the decision in the Parcher case, the court held that this immunity was not a personal privilege, *but was annexed to the railway itself and passed with any part or portion of the railway which was sold to another company.* The court said, p. 224:

"As this immunity was not simply a personal privilege conferred upon the original company, but a right appurtenant to its lines of road (First Div. St. Paul & Pacific R. Co. v. Parcher, 14 Minn. 297, 329, 330), it follows that

the condition thereto annexed always accompanied it as to every part of the road, so that any company in acquiring any portion thereof, with the franchises and immunities appertaining therto, took it subject to the condition and burdended with the charge. It follows, from these views, that the plaintiff company became liable to pay 3 per cent of its yearly gross earnings from and after the expiration of ten years, computed from the time when the first thirty miles of the original lines of road were in fact completed and put in operation. By what company or companies this was done is a matter of no moment as affects the question under consideration. If, as the fact is claimed to be in this case, the expiration of this ten year period does not coincide with the commencement of the fiscal year embraced in its annual account to the state treasurer, the company will be required to pay 2 per cent of its gross earnings accruing during such fiscal year prior to the expiration of such period, and 3 per cent upon that portion thereof accruing thereafter, and its accounts should be rendered accordingly."

It will be noted that in the passage above quoted, the court states in so many words, that the immunity was "not simply a personal privilege conferred upon the original compnay, but a right appurtenant to its lines of road," and proceeded to hold that the immunity followed and was appurtenant to every part of the road which happened to be conveyed.

E. St. Paul & Sioux City Railroad Company.

This company was the successor of the Root River Valley & Southern Minnesota Railroad Co., which was authorized and received a grant under

chapter 1 of the Laws of 1857. We have already quoted section 9 of that act. Under subdivision 2 of chap. 1 of the Special Laws of 1864, the rights acquired by the state under foreclosure of a certain branch of the road were conferred upon the Minnesota Valley Railroad Co. By another section of the 1864 law, the rate of taxation was changed so that the company was to pay 1% for 3 years, 2% for 7 years, and 3% thereafter.

In City of St. Paul v. St. Paul & Sioux City Ry. Co., *supra*, the court held that the provisions of the constitution did not prevent the modification of the exemption found in the charter of the original company, and also held that the contract of exemption passed to the Sioux City Co. The court said (pp. 474, 475, of the Opinion):

> "There is no force in the suggestion that the legislature had no constitutional power to enact this amendement because of the limitations upon the taxing power imposed by §§ 1 and 3 of art. 9 of the constitution. The line of railroad in question, together with the lands, property, immunities and franchises pertaining therto, is held under a grant made prior to the adoption of the constitution, and is hence unaffected by any of its provisions relating to the taxing power, and the mode in which it shall be exercised. This was fully settled by this court in the analogous case of First Div. St. Paul & Pacific R. Co. v. Parcher, 14 Minn. 297. Upon the renewal of the grant, in 1864, to the present company, it was therefore clearly competent for the legislature to change and modify its terms and conditions, so as to require the annual payment of a different rate per cent of the gross earnings of the road, to commence upon the completion of

> thirty instead of fifty miles, and in consideration of such annual payment, to exempt the railroad, its appurtenances and other property from all taxation ,and from all assessments, both general and local. This modification of the original contract was prohibited by no provision of the constitution and the enactment of March 4, 1864, in this regard, has not only been uniformly recognized and acted upon ever since, as valid, by both the executive and legislative departments of the state government, but by an express constitutional amendment adopted in 1871, it has been placed beyond the reach of any amendment or repeal, except by a law ratified by a vote of the electors of the state."

This decision is particularly interesting, as it holds that a commuted system of taxation established before the constitution was adopted is not only valid, but may be amended or modified by the legislature in case of a re-grant and consent of the successor company.

The Sioux City grant was again considered in County of Nobles v. Sioux City & St. Paul Railroad Co., supra. There it was admitted that the Minnesota Valley Railroad Co. acquired the exemption contained in the original grant, but it was contended that by the transfer of the road from the St. Paul & Sioux City Co. to the Sioux City & St. Paul Co., under chap. 50 of the Laws of 1869, this exemption was lost. The 1869 law is quoted in the opinion. It authorized the consolidation of the St. Paul & Sioux City Company with the Sioux City & St. Paul Co. of Iowa, so as to form a continuous line. In 1871 the former company transferred to the Sioux City & St. Paul Co. a cer-

tain part of its line and the franchises appurtenant thereto. The Court said:

> "All the acts of the legislature, from first to last, show it was intended that this exemption should exist in favor of any company, which, in consideration of the land grant, should assume the construction and maintenance of the line to which it was applicable. It is so expressed in the act of May 22, 1857, in respect to the Root River Valley & Southern Minnesota Company and in the act of March 4, 1864, in respect to the Minnesota Valley Company; and in the act of 1869 the authority given to the latter company to transfer to the Sioux City & St. Paul Company, not the lands merely, but 'so much of the line and land grant' implies that the company so authorized might pass to the other all the benefits, together with the burdens, of the grant of land made by the state."

F. Northern Pacific Railroad.

The case of State v. Northern Pacific R. Co., supra, involved the question whether the Northern Pacific Co. was bound to pay 3% upon the gross earnings from that portion of the line of road from St. Paul to St. Cloud owned by the Manitoba Co., but over which the Northern Pacific Co. operated its trains under a contract between the two. The history of this line, so far as the Manitoba Co. is concerned, has already been given. The lease by that company to the Northern Pacific Co. authorized the latter to run its trains over the line, and the precise question in dispute was whether the 3% gross earnings tax was appurtenant to the line or was merely personal to the Manitoba Co. which owned it. The court held that the contract be-

tween the two companies passed an interest or estate in the property, and that the gross earnings tax pertained to and attached itself to this property interest in whosoever's hands it came. The court said:

> "In State v. St. Paul M. & M. Ry. Co., 30 Minn. 311, the term 'Gross Earnings,' in the foregoing quotation, was held to include not rents received for the right to operate the railroads, but only sums earned by operation, and that leasing or selling the railroad cannot affect the rights of the state; and into whosesoever hands it may pass, and whoever may receive the gross earnings, the obligation to pay, and the right of the state to receive, the three per centum on such gross earnings are unimpaired, and they still furnish the measure of such obligation and right. In First Div. etc. R. Co. v. Parcher, 14 Minn. 224 (297), it was held that the exemption from taxation was not a personal privilege conferred on the Minnesota & Pacific Railroad Company, but a right appurtenant to its lines of road; and in Chicago, M. & St. P. Ry. Co. v. Pfaender, 23 Minn. 217, that the condition annexed to it, to-wit, the obligation to pay the percentage on gross earnings, always accompanied it as to every part of the road, so that any company in acquiring any portion thereof, with the franchises and immunities appertaining thereto, took it subject to the condition and burdened with the charge. So that, when the line of road in question here passed to the St. Paul & Pacific Railroad Company, then to the First Division of the St. Paul & Pacific Railroad Company, and finally to the St. Paul, Minneapolis & Manitoba Railway Company, each took it with the exemption, and the obligation to pay the percentage. And as the exemption and charge would accompany any part, however small, of the original company's lines, it follows, that ordinarily, if any company should

> acquire any estate or interest in any part of such lines that would give it the right to operate the same as a railroad, and to receive gross earnings from operating it, the company would take and hold such estate or interest exempt from taxation, but subject to the obligation to pay the percentage on the gross earnings received by it * * *.
>
> "We, therefore, conclude that the defendant took and holds its interest in the line of road in question subject to the obligation imposed on that line by the act of 1857."

This decision leaves no room whatever for the distinction attempted to be made by the court in the Great Northern case above referred to. It was not the case of a land grant in any sense. The decision is a straight holding that the tax immunity is appurtenant to the line of road. Furthermore, the Northern Pacific Co., into whose hands this interest in the line of road came, accompanied by the tax immunity, had nothing whatever to do with the construction or completion of the line.

The entire history of the system of gross earnings taxes upon railroad property is again set forth in the Traverse County case. We quote at length from the opinion:

> "It is a part of the legislative history of Minnesota, both as a territory and as a state, that its policy in regard to taxing land grant roads was adopted with reference alike to facilitating the early construction of these lines of road, and to securing to the state what was supposed an untimate and adequate return for the value of the franchises conferred and which would in the long run, be the equivalent of the company's fair share of taxation. The

policy adopted was to provide for these companies paying to the State a certain percentage of their gross earnings in lieu of all other taxation on their railroads and also on their granted lands until sold by the company; this latter being (unfortunately, as subsequent experience has proven) without limitation as to time. The object of this was not to grant a personal favor to the original companies, but to secure the construction of the lines of road. Hence, as might naturally be supposed, the history of legislation, as well as the decisions of this Court, clearly indicate that the general understanding was that this system of taxation was not personal to the original company, but was to be alike applicable to any of their successors, which might assume the completion of the road. The acts of the legislature on this subject, too numerous to be cited, all bear out this assertion.

"*The decisions of this Court from the Parcher case down have all been to the effect that this exemption from ordinary taxation was not simply a personal privilege conferred upon the original company, but was appurtenant to the line of road, and existed in favor of any company which in consideration of the land grant, should assume the construction and maintenance of the line by which it was applicable;* that the immunity as well as the burden passed to any company which acquired the road, and assumed its operation and the performance of all the other duties which the original company owed to the public; that the transfer of the road and land grant to such a company did not constitute a sale of the lands within the meanings of either the act of 1857 or of acts similar to those of 1865 already referred to. First Division v. Parcher, supra; State v. Winona & St. Peter R. Co., 21 Minn. 315; Chicago, M. & St. P. Ry. Co. v. Pfaender, 23 Minn. 217; City of St. Paul v. St. Paul & S. C. R. Co., 23 Minn. 469; County of Nobles v. Sioux City & St. P. Ry. Co., 26 Minn. 294 (3 N. W.

701); State v. St. Paul, Minneapolis and Manitoba Ry. Co., 30 Minn. 311 (15 N. W. 307); State v. Northern Pac. Ry. 32 Minn. 294, (20 N. W. 234); County of Hennepin v. St. Paul, M. & M. Ry. Co., 33 Minn. 534 (24 N. W. 196); County of Ramsey v. Chicago, M. & St. P. Ry. Co., 33 Minn. 537 (24 N. W. 313); County of Stevens v. St. Paul, M. & M. Ry. Co., 36 Minn. 467 (31 N. W. 942).

"It has also been repeatedly held by this Court, as well as by the Supreme Court of the United States, that the substitution of an assessment upon gross earnings in lieu of all other taxes on the road and the granted lands, does not exempt the lands from taxation, but merely substitutes one method of taxation for another, upon the terms and conditions specified; and for that reason the latter court, which is very tenacious of the doctrine that an exemption from taxation must be clearly shown and strictly construed, has held that this doctrine does not apply, at least to its full extent, to such a case. Northern Pac. R. Co. v. Clark, 153 U. S. 252, 14 Sup. Ct. 809; McHenry v. Alford, 168 U. S. 651, 18 Sup. Ct. 242. And this court held to the same effect in City of St. Paul v. St. Paul & S. C. R. Co., supra.

"In some of these cases the point decided was that any company owning and operating the road was liable to pay the 3 per cent gross earnings tax; but the converse of this must be true, inasmuch as this is a tax on the granted lands (until sold) as well as on the railroads; and, if the burden is appurtenant to the road, so must be the reciprocal benefit, the two being parts of a unit. It will also be observed that, in some of the cases, the railway company which was a party to the suit was not one of those to whom the state granted the land, property and franchises of one of the original land grant companies acquired by it under foreclosure of the mortgages executed to secure the state loan of credit in 1858. At least two of the cases (21 Minn. 315; 36 Minn. 467) in-

volved the taxation of lands embraced in the increased grant of 1865; and in neither of them, nor in any of the other cases cited, was it even suggested that there was any distinction, as to taxation, between such lands and those embraced in the original grant of 1857. In fact, except as to lands outside of the 15-mile indemnity limits of the original grant, it would be impossible to distinguish between the two. The whole was treated and adjusted as one grant.

"But there can be no question but that the acts of 1865, already cited, include the increased as well as the original grant, and in terms apply the commuted system of taxation to the whole. This court has twice decided that the provisions of these acts exempting the roads and land grant lands from ordinary taxation, in consideration of the payment of a percentage of the gross earnings of the road, were, as to the territorial land grant companies, not in conflict with the provisions of the constitution relating to taxation. State v. Winona & St. P. R. Co., supra; City of St. Paul v. St. Paul & S. C. R. Co., supra. But it is immaterial whether these acts were or were not valid when originally enacted, for the reason that they were validated by the constitutional amendment of 1871 (State v. Luther, 56 Minn. 156, 57 N. W. 464); and it could not be claimed in any event that they were repealed or modified prior to the passage of the Anderson bill in 1895.

"Whatever errors of law, if any, may be involved in the practical or judicial construction of either constitution or statutes on the subject of the taxation of land grant lands of the old territorial railroad companies or their successors, after that construction has been adopted and acted upon by all departments of the Government, and generally acquiesced in for so many years, it must now be adhered to. It is now too late to think of undoing the past.

> All these years the defendant has been paying, and the state accepting taxes on these lands in the substituted or commuted form of a percentage of the gross earnings of the road. This was done for 1894, the very year for which the state is here seeking to enforce these taxes. The question whether the legislation on the subject involves the elements of a contract between the defendant or its predecessor and the state is not necessarily involved, and need not now be considered."

(The italics are ours.)

Counsel for the State laid considerable stress upon some of the language above quoted, particularly that which the court uses in stating the object for which the commuted system was designed. It is quite true that the court said in describing the historical phases of this matter that the exemption exists in favor of any company which should assume the construction and maintenance of the line to which it was applicable. Seizing upon this expression, counsel drew the broad and unjustifiable conclusion that the exemption does not extend to any sucessor company which did not happen to do any active work by way of construction or completion of the line. This conclusion, as we have already seen, is directly at variance with the actual decision of the court in State v. Northern Pacific Ry. Co. supra.

The case of Minneapolis & St. Louis R. R. Co. v. Koerner, 85 Minn. 149, constitutes a further refutation of the theory adopted by the Minnesota court for the first time in the Great Northern case and the present case, that a contract for a commuted

tax inures to the benefit only of the company actually constructing the road. In that case it appeared that the Minneapolis, New Ulm & Southwestern R. R. Co. was incorporated under the general law, in 1895, and built a line extending from Winthrop in Sibley County, to New Ulm in Brown County. Under Sections 1667 to 1669 of the General Statutes of 1894, the road so built became subject to a tax of one per cent on its gross earnings during the years 1897, 1898 and 1899; two per cent from 1900 to 1906, inclusive, and three per cent thereafter, such gross earnings tax being in lieu of all other taxes. The one per cent tax was paid by the road in 1897 and 1898. In February, 1899, the Minneapolis & St. Louis Railroad Co. purchased the Minneapolis, New Ulm & Southwestern Railroad, together with all of its lands, equipment, rights, franchises, immunities and property of every kind, and has since then been the owner and in possession thereof. The State contended that this merger of the New Ulm Co. upon which a one per cent gross earnings tax was due, with the M. & St. L. Co. which was required to pay a three per cent gross earnings tax, resulted in making the three per cent tax applicable to the entire system owned and controlled by the latter company. The court overruled this contention, and held that the one per cent gross earnings tax followed the property into the hands of the purchasing company. Justice Lewis, speaking for the court, said:

"Under the law of this state appellant is required to pay a tax of three per cent on its gross earnings, and the state insists that the purchase of the New Ulm & Southewestern operated as a merger of that road into appellant's system, and that the earnings of the purchased road are to be estimated in making up the amount of the gross earnings of the purchaser. These acts have been construed adversely to the state's position in State v. Northern Pac. R. Co., 36 Minn. 207, 30 N. W. 663.

"It has long been settled by the decisions of this state that the gross earnings tax law was not intended to change the character of the tax, but, for the purpose of certainty, was intended to change the method of computation. The amount required to be paid still remains a tax upon the railroad property, and not against the corporation. It is often referred to as the 'commuted tax.'

"Another purpose of enacting the law referred to was evidently to induce capital to become interested in railroad building. The legislature took note of the well-known fact that a new railroad in a new country might, for some years, be a matter of experiment, and in its first experience unprofitable; but that, as the country through which it runs is settled and developed, the railroad business increases, and, in proportion, the company becomes able to pay a higher rate of taxation. In its wisdom, the legislature adjusted the tax to those experimental stages as provided in the act. It was immaterial to the state whether such new roads continued to be operated under a lease or by a purchaser, or whether they continued to be owned and operated by the original corporation. The act contains no express prohibition to a sale and transfer of such railroads to companies already subject to the three per cent gross earnings tax, and there is no language from which it can be implied. If it be conceded that a merger arises where roads paying a one per cent tax are sold to a com-

pany paying a three per cent tax, the converse must be equally true, and a merger occurs when the road paying a three per cent tax is sold to a company paying a one per cent tax. The statutes are not capable of any such construction, and our conclusion is that no change has been effected in the rate of taxation on the gross earnings of the Minneapolis, New Ulm & Southwestern road from the fact that it has been purchased and is now operated by appellant."

It should be remembered that when the territorial legislature adopted this policy the gross earnings tax was not, properly speaking, regarded as an exemption or immunity in the same sense that we use the terms today. The bargain between the Territory and future State and the grantee of the charter was looked upon as a fair one to both parties. It was supposed that the tax secured to the State was, as the court in the Traverse County case has said, "an ultimate and adequate return for the value of the franchises conferred and which would in the long run be the equivalent of the company's fair share of taxation."

Moreover, the State was interested not merely in the construction of a road, but also in its maintenance. The company which assumed the maintenance of the road was deemed to be as much within the provision for the gross earnings system as the company which should engage in the actual work of construction. One result was as important to the State as the other.

The simple fact of the whole matter seems to be that when the State entered into these contracts

for a commuted system of taxation they were intended to apply to and be appurtenant to the lines affected for all time and into whosesoever hands they might come. This is the logical and indeed the only conclusion which can be drawn from the charters themselves and from the decisions of the court construing them down to the present cases.

FEDERAL DECISIONS.

We have quoted at length from the decisions of the Supreme Court of Minnesota to show the state of the law as it had existed in that state from the beginning down to the reversal of its previous rules by the Supreme Court in the present case and its companion case against the Great Northern Railway Company. In a number of the opinions of the Minnesota court, cases from this court are cited. It will probably not be contended by counsel that any doubt exists as to the view of this court upon the capacity of the legislature of a State or Territory to contract with reference to taxation. It has often been held by this court that such a contract may be made in a corporate charter, and that the same is not subject to amendment or repeal without the consent of the grantee. This seems to be admitted by the Minnesota Supreme Court in its opinion in the Great Northern case (see 106 Minn. 322, and 119 N. W. 205: Subdivision 1). Two illustrative cases in this court are Powers v. Detroit & Grand Haven Railway Company, 201 U. S. 543, and State Bank of Ohio v. Knoop, 16 Howard, 369. In the latter case

the banking corporation claimed a perpetual contract for the payment of a certain percentage of its profits in lieu of all other taxes. This contract was made, by the acceptance of the terms of a general law, applicable to all banks which might accept its terms, which were stated by the court as follows:

> "The 60th section provides that each banking company under the act, or accepting thereof, and complying with its provisions, shall, semi-annually, on the days designated for declaring dividends, set off to the State six per cent on the profits, deducting therefrom the expenses and ascertained losses of the company for the six months next preceding, which sum or amount so set off shall be in lieu of all taxes to which the company, or the stockholders therein, would otherwise be subject. The sum so set off to be paid to the treasurer on the order of the auditor of state."

Subsequently, the legislature passed another law taxing the bank in a different way. In a suit brought to recover taxes under the later act, the bank pleaded the provisions of the law under which it was incorporated. The court said:

> "This compact was accepted, and on the faith of it fifty banks were organized, which are still in operation. Up to the year 1851, I believe, the banks, the profession, and the bench, considered this as a contract, and binding upon the State and the banks. For more than thirty-five years this mode of taxing the dividends of banks had been sanctioned in the State of Ohio. With few exceptions, the banks were so taxed, where any tax on them was imposed. In the case of the State of Ohio v. The Commercial Bank of Cincinnati, 10 Ohio, 535, the Supreme Court of Ohio say, we take it to be well settled, that the charter of a private

corporation is in the nature of a contract between the State and the corporation. Had there ever been any doubts upon this subject, those doubts must have been removed by the decision of the Supreme Court of the United States in the case of Woodward v. Dartmouth College. And the court remark, 'the general assembly say to such persons as may take the stock, you may enjoy the privileges of banking, if you will consent to pay to the State of Ohio, for this privilege, four per cent on your dividends, as they shall from time to time be made. The charter is accepted, the stock is subscribed, and the corporation pays, or is willing to pay, the consideration stipulated, to-wit, the four per cent.' And the court say, 'here is a contract, specific in its terms, and easy to be understood.' 'A contract between the State and individuals is as obligatory as any other contract. Until a State is lost to all sense of justice and propriety, she will scrupulously abide by her contracts, more scrupulously than she will exact their fulfilment by the opposite contracting party.'

"This opinion commends itself to the judgment, both on account of its sound constitutional views and its elevated morality. It was pronounced at December term, 1835. That decision was calculated to give confidence to those who were desirous to make investments in banking operations, or otherwise, in the State of Ohio.

"Ten years after this opinion, and after an ineffectual attempt had been made by the act of 1842, and its amendment in 1843, to organize banks in Ohio, without a compact as to taxation, the act of 1845 was passed, containing a compact much more specific than that which had been sustained by the Supreme Court of the State. Under such circumstances, can the intentions of the legislature of Ohio, in passing the act of 1845, be doubted, or the inducements of the stockholders to invest their money under it? Could either have sup-

posed that the 60th section proposed a temporary taxation? Such a supposition does great injustice to the legislature of 1845. It is against the clear language of the section, which must ever shield them from the imputation of having acted inconsiderately or in bad faith. They passed the charter of 1845, which they knew would be accepted, as it removed the objections to the act of 1842.

"Can the compact in the 60th section be 'regarded as a law prescribing a rule of taxation until changed, and not a contract stipulating against any change; a legislative command, and not a legislative compact with these institutions?' We cannot but treat with a great respect the language of the highest judicial tribunal of a State, and we would say that in our opinion it does not import it to be a legislative command nor a rule of taxation until changed, but a contract stipulating against any change, from the nature of the language used and the circumstances under which it was adopted. According to our views, no other construction can be given to the contract, than that the tax of six per cent on the dividends is in lieu of all subsequent taxes which might otherwise be imposed; in other words, taxes to which the company or the stockholders would have been liable, had the specific tax on the dividends on the terms stated not been enacted.

* * * * * * * * * * * *

"The assumption that a State, in exempting certain property from taxation, relinquishes a part of its sovereign power, is unfounded. The taxing power may select its objects of taxation; and this is generally regulated by the amount necessary to answer the purposes of the State. Now, the exemption of property from taxation is a question of policy, and not of power. A sound currency should be a desirable object to every government; and this, in our country, is secured generally through the instrumentality of a well-regulated system of banking. To establish such institutions as

> shall meet the public wants and secure the public confidence, inducements must be held out to capitalists to invest their funds. They must know the rate of interest to be charged by the bank, the time the charter shall run, the liabilities of the company, the rate of taxation, and other privileges necessary to a successful banking operation."

The doctrine of the case just cited has been reiterated frequently by this Court down to the present time. In Powers v. Detroit & Grand Haven Ry. Co., supra, it appeared that the charter of the railroad company under consideration in that case provided that:

> " * * the said company shall, on or before the first day of July, pay the state treasurer an annual tax of one per cent on the capital stock of said company paid in, which tax shall be in lieu of all other taxes, except for penalties imposed upon said company by its act of incorporation, or any other law of this State. The said tax shall be estimated upon the last annual report of said corporation."

The legislature of Michigan subsequently adopted a different system of taxation, and the question of its applicability to this railroad company eventually was taken to this Court, which held that the company had a perpetual contract for a commuted system of taxation which could not be altered by any subsequent law. The case was distinguished by the court from that of Wisconsin & Michigan R. R. Co. v. Powers, 191 U. S. 379, which involved a general law rather than a special charter. No general law is held to give rise to a contract unless it specifically and clearly provides that such shall be

the effect of its acceptance. On this point the court said, first quoting from the Wisconsin & Michigan R. R. Co. case, *supra*, as follows:

> "'A distinction between an exemption from taxation contained in a special charter and general encouragement to all persons to engage in a certain class of enterprise, is pointed out in East Saginaw Manufacturing Company v. East Saginaw, 13 Wall. 373 ('Salt Company v. East Saginaw'); S. C. 19 Mich. 259. In earlier and later cases it was mentioned that there was no counter-obligation, service, or detriment incurred, that properly could be regarded as a consideration for the supposed contract. Rector, &c. of Christ Church v. Philadelphia County, 24 How. 300; Tucker v. Ferguson, 22 Wall. 527; Grand Lodge, &c. of Louisiana v. New Orleans, 166 U. S. 143. * * * The presence or absence of consideration is an aid to construction in doubtful cases—a circumstance to take into account in determining whether the State has purported to bind itself irrevocably or merely has used words of prophecy, encouragement, or bounty, holding out a hope but not amounting to a covenant.'
>
> "That there was ample consideration for a contract in this case, if consideration be necessary, is shown by the opinion of the Supreme Court in Attorney General v. Joy, supra, when it says (p. 101):
>
> "'The act of 1855 was not promoted exclusively in the interest of the railroad companies named in it, but the State itself was largely concerned, and expected to accomplish important public purposes by means of it. Twenty years before that time the State had planned for the construction of several parallel lines of railroad across the State from east to west, one of which was to be north of the line of the Michigan Central Railroad, and was expected to be of very high value, not only to all that part of the State through which it

would run, but to the whole State. Much disappointment had come from the road not being constructed; and when the Detroit & Pontiac Rail Road Company, which already had near thirty miles of road in successful operation, and could command means for the construction of more, proposed, on certain terms which were expressed in the act of 1855, to purchase the right and franchises of the Oakland & Ottawa Company, and to extend their own road to Lake Michigan, there is no reason for doubting that the people of the State at large looked upon this as a favorable opportunity for accomplishing a desire which twenty years before had found expression in the legislation of the State, and which ever since had been kept constantly in view.'

* * * * * * * * * * * * *

"'It has already been seen that the important public purpose which the State had in view in assenting to the act of 1855 has been accomplished; the railroad from Pontiac to Lake Michigan has been constructed and for many years operated, and the State has reaped the benefits. But in order to accomplish this public purpose it seems to have become necessary to put the bonds and shares of the Detroit & Milwaukee Railway Company upon the market as well in Europe as in this country; the State recognized the necessity, and by its legislation provided for facilitating sales. The bonds and shares were sold to the amount of very many millions; and every purchaser of one of them made the purchase in reliance upon legislation of this State which appeared to sanction if not invite it' (p. 104).

"See further Home of the Friendless v. Rouse, 8 Wall. 430, 436, in which we said:

"'It is objected that there is no consideration stated in the act for the release from taxation, which it is claimed is necessary in order to uphold the contract. But this is a mistaken view of the law on this subject.

"'There is no necessity of looking for the consideration for a legislative contract outside of the objects for which the corporation was created. These objects were deemed by the legislature to be beneficial to the community, and this benefit constitutes the consideration for the contract, and no other is required to support it.'

"Surely no clearer case of contract can be presented than one in which a legislature passes an act in respect to a particular corporation making special provision concerning taxation, and does so with a view of inducing large expenditures by the corporation and the completion of an unfinished road, whose completion is deemed of great public importance, and where the special provision is, as required, formally accepted, the expenditures made, and the road completed.

"It is suggested that this provision is not in terms made perpetual. A sufficient answer to this is found in Home of the Friendless v. Rouse, *supra* (p. 437):

"'Testing the contract in question by these rules, there does not seem to be any rational doubt about its true meaning.' 'All property of said corporation shall be exempt from taxation,' are the words used in the act of incorporation, and there is no need of supplying any words to ascertain the legislative intention. To add the word 'forever' after the word 'taxation' could not make the meaning any clearer. It was undoubtedly the purpose of the legislature to grant to the corporation a valuable franchise, and it is easy to see that the franchise would be comparatively of little value if the legislature, without taking direct action on the subject, could at its will resume the power of taxation.'"

There are a number of cases in this court which are in accord with the long line of decisions of the State of Minnesota on the question of the transfer

of the right to this commuted tax to the successor corporation.

Tennessee v. Whitworth, 117 U. S. 140;
Tomlinson v. Branch, 15 Wall. 460;
Humphrey v. Peuges, 16 Wall. 244;
Cent. R. R. & Banking Co. v. Georgia, 92 U. S. 665;
Phil. & Wilmington R. Co. v. Maryland, 10 How. 376.

In Tennessee v. Whitworth, *supra*, the court had under consideration the question whether the Nashville & Decatur Railroad Co. enjoyed the same charter contract for the exemption of its capital stock from taxation as had been held by the Nashville & Chattanooga Railroad Co. The facts were as follows:

The Tennessee & Alabama Railroad Co. had been incorporated by the legislature of Tennessee in 1852 with authority to build from Nashville, by way of Franklin, to the line between Tennessee and Alabama in the direction of Florence, Alabama. The company was granted all the rights, powers and privileges and subjected to all the liabilities and restrictions of the Nashville & Chattanooga R. R. Co.

Later, in 1853, the Central Southern R. R. Co. was incorporated by the Tennessee legislature to build from a point of intersection with the Tenn. & Alabama R. R. Co. at Columbia, by way of Pulaski, to the Alabama state line, in the direction of Athens and Decatur, Alabama, and to connect with any road that might be built from De-

catur to the state line in the direction of Pulaski. This latter company was also given all the powers and privileges, and subjected to all the liabilities and restrictions provided in the charter of the Nashville & Chattanooga Co.

The Tenn. & Alabama Cent. R. R. Co., a third corporation, was incorporated by the legislature of Alabama in 1853, to build from Montevideo, Ala., through Decatur to the Tennessee boundary, and to connect with a road leading through Pulaski to Columbia, Tennessee. The charter authorized the company:

> "To unite and consolidate into one road all or such part of the said road with any railroad that may connect with the said Tennessee & Alabama Central Railroad at the Tennessee line."

In 1863 the Tennessee legislature passed another act authorizing the consolidation of the Tennessee & Alabama Co. and the Central Southern R. R. Co., under the laws of Tennessee, with all the rights, powers and privileges of the Nashville & Chattanooga Co., under the name of the Nashville & Decatur R. R. Co.; the new company to be entitled to all the rights and privileges and subject to all the restrictions and liabilities of the Nashville & Chattanooga Co.

The consolidated company was also authorized to consolidate with the Alabama & Tennessee Cent. R. R. Co., organized under the laws of Alabama.

The question involved was whether the exemption from taxation contained in the charter of the Nashville & Chattanooga Co. was conferred upon

this consolidated corporation. Chief Justice Waite, writing the opinion of the court, said:

> "The question whether the capital stock of the Nashville & Decatur Company is entitled to the same exemption as that of the Nashville & Chattanooga Company depends, 1, on whether the grant to the Tennessee & Alabama Company of 'all the rights, powers and privileges,' and to the Central Southern Company of 'all the powers and privileges' of the Nashville & Chattanooga Company, carried with it to the new companies the exemption from taxation provided for in § 38 of the Nashville & Chattanooga charter, and, if it did, 2, whether the Nashville & Decatur Company and its stockholders are entitled to the same exemptions as the original Tennessee corporations and their stockholders had.
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> "As early as 1850, before either the charter of the Tennessee & Alabama Company, or that of the Central Southern Company was granted, this court said in Philadelphia, Wilmington & Baltimore Railroad Co. v. Maryland, 10 How. 376, 393, speaking by Mr. Justice Taney, that a statute which authorized the union of two railroad companies, and secured to the united company the 'property, rights and privileges which that law, or other laws, conferred on them (the separate companies), or either of them,' extended to the united company an exemption from taxation in the charter of one of the uniting companies, and this although it was at that time said that 'the taxing power of a state is never presumed to be relinquished, unless the intention to relinquish is declared in clear and unambiguous terms.' This has been expressly reaffirmed in Tomlinson v. Branch, 15 Wall. 460; Humphrey v. Pegues, 16 Wall. 244; Southwestern Railroad v. Georgia, 92 U. S. 676; and the correctness of the decision was recognized in Central Railroad & Banking Co. v. Georgia, 92 U. S. 665; Morgan v. Louisiana, 93 U. S. 217; Railroad Companies

v. Gaines, 97 U. S. 697, 711; Railroad Co. v. Georgia, 98 U. S. 359, 360; Railroad Co. v. Hamblen, 102 U. S. 273, 277; Railroad Co. v. Commissioners, 103 U. S. 1, 4; Wilson v. Gaines, 103 U. S. 417; Louisville & Nashville Railroad Co. v. Palmes, 109 U. S. 244, 253; and Chesapeake & Ohio Railroad Co. v. Miller, 114 U. S. 176, 185. * * *

"It only remains to consider whether the Nashville & Decatur Company is entitled to the same exemption. When two railroad companies unite or become consolidated under the authority of law, *the presumption is, until the contrary appears, that the united or consolidated company has all the powers and privileges, and is subject to all the restrictions and liabilities of those out of which it was created.* Tomlinson v. Branch, 15 Wall. 460; Branch v. Charleston, 92 U. S. 677, 682; County of Scotland v. Thomas, 94 U. S. 682, 690; Railroad Co. v. Maine, 96 U. S. 499, 512; Green County v. Conness, 109 U. S. 104. From this it follows that, as the capital stock of both the original Tennessee corporations was exempt from taxation, the capital stock of the united or consolidated company formed by the simple aggregation of that of the two old ones, is also exempt, unless it has been proved to the contrary. Is there then, anything in the statute authorizing the union which rebuts this presumption? We think there is not. The language relied on to show the contrary intention is this: 'That the said Nashville & Decatur Railroad shall, for its government, be entitled to all the powers and privileges, and be subject to all the restrictions and liabilities conferred and imposed upon the Nashville & Chattanooga Railroad Company.' This is the exact language of the corresponding provision in the charter of the Tennessee & Alabama Company, one of the original companies, save only that the words 'for its government' have been added. As we hold that this was sufficient to exempt the capital stock of the original com-

panies from taxation, it follows that the new company is also exempt, unless the added words were intended as a limitation upon the effect of the others. * * *

"In all this class of cases the question is one of legislative intent, with a presumption against an intent to grant an exemption from taxation. Here there is no charter of a new corporation with power to build a new railroad. No new taxable property is created. The legislation contemplates nothing more than the making of one railroad corporation out of two old ones, each of which has a completed railroad and the privileges of an exemption of its capital stock from taxation. If nothing at all had been said about the powers and privileges of the new corporation, the presumption would have been that it took all which were possessed by the two original companies at the time of their union. To rebut this presumption it is necessary that a contrary intention should appear. The question is not as to a grant of new powers, but as to the taking away of old ones."

In Tomlinson v. Branch, *supra*, the South Carolina Canal & Railroad Company was chartered by the South Carolina legislature in 1827 for the purpose of constructing a railroad or canal or both from Charleston to Columbia, Camden & Hamburgh. The road was built, however, only from Charleston to Hamburgh. The charter contained no exemption from taxation.

The South Carolina R. R. Co. was incorporated first under a different name, and was originally authorized to build between Cincinnati and Charleston through the states of Kentucky, Tennessee, North Carolina and South Carolina. It built only from Branchville to Columbia and a branch at

Camden. This latter company enjoyed an exemption from taxation until the dividends exceeded a certain rate of interest. In 1843 the two companies were authorized to merge and consolidate, which was done. The court held that the consolidated company took all of the powers of the two former companies, and that the exemption from taxation attached only to the part of the road to which it formerly applied. Mr. Justice Bradley, speaking for the court, said:

> "The keeping alive of the rights and privileges of the old company and transferring them to the new company in connection with the property, indicates the legislative intent, that such property was to be holden in the same manner and subject to the same rights as before. The owners of the property were to lose no rights by the transfer, nor was the public to lose any rights thereby. Of course, these remarks do not apply to those corporate rights and franchises of the old company, which appertain to its existence and functions as a corporation. These became merged and extinct. But all its rights and duties, its privileges and obligations, as related to the public, or to third persons, remain and devolve upon the new company. This seems to be the most obvious and natural construction of the act and leads to the conclusion that, as to the road, property and works appertaining to the main line from Charleston to Hamburgh, the South Carolina Railroad Company has no claim to exemption from taxation.
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> "This view of the subject is corroborated by the decision of this court in the case of The Philadelphia, Wilmington & Baltimore Railroad Company v. Maryland. It there appeared that the railroad line between Baltimore and Philadelphia had originally belonged to several distinct organizations char-

> tered by the states of Maryland, Delaware and Pennsylvania. One of these companies was exempt from certain taxation, and it was claimed by the consolidated company that this exemption was transferred to it and affected all parts of the line. The act authorizing the union of the several companies provided that the 'said body corporate so formed should be entitled * * to all the powers and privileges and advantages then belonging to the former corporations.' And the new company claimed the exemption from taxes as one of the privileges and exemptions acquired. But the court held that the exemption did not extend to a portion of the line to which it had not extended before the union. It considered the evident meaning of the law to be, that whatever privileges and advantages either of the former companies possessed should in like manner be held and possessed by the new company, to the extent of the road which the said former companies had respectively occupied before the union; that it should stand in their place, and possess the powers, rights and privileges they had severally enjoyed in the portion of the road which had previously belonged to them."

In Humphrey v. Peuges, *supra*, it appeared that the Northeastern Railroad Co. was incorporated by the South Carolina legislature in 1851. The charter contained no exemption from taxation, but in 1855 it was amended and the exemption was conferred. Prior to this time, and in 1849, the legislature had incorporated the Cheraw & Darlington Railway Co. with all of the powers, rights, privileges and immunities granted by the charter of the Wilmington & Manchester Railway Co. There was no exemption in the charters of either of the two companies last named. The Cheraw & Darlington

Co. built no line until after 1863, in which year its charter was amended by the legislature as follows:

> "§ 1. That § 5 of an act entitled 'An act to charter the Cheraw & Darlington Railroad Company,' ratified the 19th day of December, A. D. 1849, be amended so as to read as follows, to-wit:
>
> 'That all the powers, rights and privileges granted by the charter of the Northeastern Railroad Company are hereby granted to the Cheraw & Darlington Railroad Company, and subject to the conditions therein contained.'"

The Cheraw & Darlington Co. soon afterwards built a line of road and put it in operation. It was contended that the act just quoted gave the company only such rights and privileges as were granted by the original charter of the Northeastern Co., and did not include the tax exemption conferred by the amendment of 1885. The court held to the contrary in the following opinion:

> "The stockholders of the Cheraw & Darlington Company contend that the act of the 19th of December, 1855, entitled 'An act to amend the charter of the Northeastern Railroad Company,' etc., formed a part of the charter of the Northeastern Company in 1863 when the privileges conferred upon that company were granted to the Cheraw & Darlington Company.
>
> "The State contends that the privileges thus granted were limited to those conferred upon the Northeastern by its original charter or act of incorporation, passed in 1851.
>
> "All the 'privileges' as well as powers and rights of the prior company, were granted to the latter. A more important or more comprehensive privilege than a perpetual immunity from taxation can scarcely be imagined. It contains the essential idea of a peculiar benefit or advantage, of a special exemption

from a burden falling upon others. There is nothing in the terms of the statute of 1863 to indicate that the legislature intended to limit the privileges conferred upon the Cheraw Company to those granted to the Northeastern Company by its original act of incorporation, and to exclude the important privileges contained in the amending act. The charter of the Northeastern Company, as it existed in 1863, was based upon the two acts of the legislature passed in 1851 and 1855, respectively. The first act was entitled 'An act to incorporate' the Northeastern Company. The latter act was entitled 'An act to amend the charter of the Northeastern Company.' A charter, in the sense here used, is an instrument of authority from the sovereign power, bestowing rights or privileges; as it is briefly expressed, it is an act of incorporation. Such was the obvious understanding of the word by the legislature of South Carolina. The first act was expressed as creating the incorporation of the company; the second, using a synonymous expression purported to amend its charter. The words charter and act of incorporation were used convertibly. Whether it be said that the rights and privileges conferred upon the Northeastern, as they stood in 1863, existed in its charter or were derived from its incorporation amounts to the same thing. We have no doubt that all of them were intended to be granted to the Cheraw Company by the act of that year. The charter of incorporation of 1851 had been amended in 1855, and by an act which purported in its title not to create an original authority, but by amending the original charter to bestow additional powers upon that company. After the passage of the amended act, the Northeastern was, in law, as if it originally had been chartered, with all the rights, powers and privileges conferred upon it by the act of 1855. Such was the legal effect of the amendment; and such, no doubt, was the understanding of its effect by the legis-

ture of South Carolina, when, in 1863, they conferred all its powers and privileges upon the Cheraw Company. The case shows that from 1849 to 1863 no sufficient inducements had been found to procure the building of the Cheraw road. We are not advised what other powers and privileges were then and there conferred upon it in addition to the exemption we are considering. But this exemption was conferred; an exemption that must have been understood by the least reflecting person as being of immense value to all concerned in the road. The road was soon afterwards built, and has since then been, and now is in operation. These facts serve to show,—first, that there was, in this instance, the consideration that at any time exists for the granting by the legislature of such privilege to aid the acceptance of the same and the building of the road; and, secondly, the intention of the legislature, by omitting a reference to the original act of incorporation, to grant all the powers and privileges that had been at any time conferred upon the Northeastern Company.

"Another question is raised, to-wit: That a legislature does not possess the power to grant to a corporation a perpetual immunity from taxation. It is said that the power of taxation is among the highest powers of a sovereign state; that its exercise is a political necessity, without which the state must cease to exist, and that it is not competent for one legislature, by binding its successors, to compass the death of the State. It is too late to raise this question in this court. It has been held that the legislature has the power to bind the state in relinquishing its power to tax a corporation. It has been held that such a provision in the charter of an incorporation constitutes a contract which the state may not subsequently impair. These doctrines have been reiterated and reaffirmed so recently as the year 1871 in an opinion delivered by Mr. Justice Davis in the case of The Wilmington

> Railroad v. Reid. They must be considered as settled in this court."

To the same effect is Philadelphia & Wilmington Railroad Co. v. Maryland, *supra*, where Chief Justice Taney uses the following language:

> "Now, as these companies held their corporate privileges under different charters, the evident meaning of this provision is, that whatever privileges and advantages either of them possessed should in like manner be held and possessed by the new company to the extent of the road they had respectively occupied before the union; that it should stand in their place ,and possess the rights, powers and privileges they had severally enjoyed in the portions of the road which had previously belonged to them."

Counsel for the State devoted considerable of their argument to the proposition that the 1883 law authorizing the Minnesota & Northwestern Co. "to consolidate its stock, franchises, rights and property with that of any other railroad company which will undertake the construction and operation of the railroad," either does not, as a matter of construction, or cannot, as a matter of constitutionality, operate to transfer the irrepealable contract right to the commuted system of taxation to any other company. The argument seems to be that, in the first place, the terms of the act are not broad enough to authorize a transfer of the 2% gross earnings tax privilege; and that, in the second place, in so far as it attempts to make such a transfer or confer such a privilege upon a new company, the act is unconstitutional.

If it were not for the long list of decisions by the Minnesota Court which have already been reviewed, to the effect that the contract right in question is appurtenant to the road, and not personal to the corporation, this suggestion, which like others was adopted by the Supreme Court of Minnesota for the first time in the case under review, would be entitled to more weight. Under the circumstances, however, the plaintiff-in-error is not in any proper sense bound to rely upon the 1883 law *per se* for the title to this tax commutation. Under the decisions above reviewed the contract for the so-called immunity was complete before the constitution was adopted and attached for all time to the road to be constructed under the original charter into whosesoever hands it might come. The legislature could not, by any act passed in 1883 or at any other time, disturb this situation. All that it was called upon to do and did accomplish by the law in question, was to authorize one company to consolidate its properties with those of another. The tax immunity was a fixed attribute of the properties themselves belonging to the first company. The legislature could not divest the properties of that attribute, and naturally did not attempt to do so. Had the privilege of a commuted system of taxation been personal to the corporation, manifestly the situation would have been very different and a transfer from one corporation to another would have carried with it the privilege only in case such transfer was and could lawfully be authorized.

Consequently, to refute the contentions of coun-

sel with respect to the 1883 law and its effect, would simply involve going over again the ground already considered. This claim is predicated absolutely upon the theory that the privilege of a commuted tax was personal to the Minnesota & Northwestern Company, and that therefore the transfer to a consolidated company amounted to the raising up of a new corporation and a re-grant of the privilege. As we have seen, this view should not be accepted in the light of numerous decisions of the Supreme Court of Minnesota extending over so long a period of years as to constitute a rule of property. The exemption was not renewed or conferred again in any sense. It was fixed and determined for all time in the original contract, and it continued to exist and was designed to run with the properties themselves, regardless of subsequent legislative acts. As to all that was personal to the Minnesota & Northwestern Company in the light of the decisions, there could be no question about the transfer to any consolidated corporation; but contract rights of a substantive character running with the properties themselves and not dependent for their recognition and existence upon the continuance of or ownership by that corporation, the legislature could obviously neither take away nor grant again.

We come now to a consideration of what may be styled the *argumentum ad hominem* advanced by counsel for the appellant. It is strenuously urged that the respondent is really a foreign corporation, and that, consequently, the privilege of the com-

muted gross earnings tax cannot attach to the property while in its hands. Numerous authorities were cited for the purpose of showing that the consolidation of the Minnesota & Northwestern Company with the Kansas City Company and the subsequent reorganization of the latter company and its consolidation with the plaintiff-in-error, gave rise to an entirely new corporation, which, being established and organized since the adoption of the Constitution, together with the amendment of 1871, could not now become the holder of the irrepealable privilege of a commuted gross earnings tax, because the plaintig-in-error was originally organized under the laws of Illinois. It comes into this State, it is asserted, as a foreign corporation, notwithstanding that the consolidation with it was duly authorized by the laws of Minnesota. At the time when the plaintiff-in-error appeared on the scene, the legislature was not, under the Constitution, able to confer an irrepealable contract right to a special form of taxation. Inasmuch as there was no other source from which such a right could be drawn, according to the argument of counsel, the conclusion is reached that the contract right cannot be claimed by the Chicago Great Western Railway Company with respect to the property now held by it.

This line of argument is only another mode of stating the oft-repeated proposition of the State in this case, which was concurred in by the court below—that the privilege in question was personal and does not follow the property. Counsel and the

court declined to recognize the theory and effect of the previous decisions of the court on that subject. If there is any rule of law and of property which has been indubitably established by those decisions, it is that the contract right to the commuted tax is not in any sense personal, either to the original corporation or to any other corporation, but is rather appurtenant to the thing granted. It follows with mathematical certainty from this premise that a transfer of the rights originally granted, from one corporation to anothr, either by way of sale or consolidation, is not a renewal of the exemption, or the creation of a new right, so far as the commuted tax is concerned. We are quite ready to concede that the rule of property to which we have so frequently alluded, is not universally recognized. In jurisdictions where is has not been established, it is natural that we should find decisions of the character relied upon by counsel for the state. In all these decisions it appeared that the court regarded the contract for a special form of taxation, as personal to the grantee. Once that point is admitted, then it must follow that the same personal right or privilege cannot be subsequently acquired by another entity when there has been an intervening constitutional prohibition upon the granting of such a privilege.

So we submit that in view of the rule so long established by the Minnesota court, it makes not a particle of difference what the rights or privileges personal to any successor corporation may be. The commuted tax with which we are concerned is ap-

purtenant only to the thing granted or received. To attempt to transform this attribute of the property itself into an attribute of the successor corporation holding the property is to render nugatory all of the decisions of the Minnesota court on the subject up to the decision of this case below. Both on theory and on the actual wording of the decisions it is proper to say that the plaintiff-in-error as a corporation does not enjoy this privilege at all. The privilege is attached to the property in its control.

We again invite the court's attention to the case of State v. Northern Pacific Railway Company, 32 Minnesota, 294. There the Northern Pacific Company was a foreign corporation which came into the State and acquired its interest in the Manitoba line from St. Paul to St. Cloud after the adoption of the Constitution. It was nevertheless held that the gross earnings tax commutation applied to the property in the hands of the foreign corporation. We insist that the decision in that case was a perfectly logical and proper application of the rule.

Counsel attempted to reduce the whole question to one of the legal capacity or incapacity of the plaintiff-in-error to take the immunity which is claimed. It must be manfest that this is only an ingenious method of asserting that the immunity conferred in the act of 1856 was a personal one, rather than one appurtenant to the thing granted. Of course it would be absurd to assert that a privilege which was not personal to the Minnesota & Northwestern Company in the first instance, be-

came personal to the Chicago Great Western Railway Company simply because it was technically a foreign corporation or a consolidated corporation.

It is proper at this point to notice again the history of the Minnesota & Northwestern Company down to the present time. As we have seen by an amendment to its charter, made in 1883, the Company was authorized to consolidate its stock, rights, franchises and property with that of any other railroad company which might undertake the construction and operation of the road. The Minnesota & Northwestern Company acquired a line from St. Paul to Dubuque, and furthermore acquired the beneficial ownership in a line from Dubuque to Chicago under the title of the Minnesota & Northwestern Railroad Company of Illinois. Thereafter the Chicago, St. Paul & Kansas City Company, an Iowa corporation acting under express legislative authority, exchanged its stock for the stock of the Minnesota & Northwestern Company, and later acquired a line from Oelwein southwest to Des Moines in the state of Iowa. Subsequently, in 1892, and 1893, pursuant to a plan of reorganization authorized by the first mortgages of both the Minnesota & Northwestern and the Kansas City companies, and also authorized by the statutes of Illinois and Iowa, the Kansas City Company was consolidated with the Chicago Great Western Railway Company, an Illinois corporation. The Iowa statute permitting consolidations reads as follows:

> "Sec. 2036. MAY JOIN OR CONSOLIDATE. Any such corporation may join, intersect and unite its railway with that of any

other corporation at such point upon the boundary of this state as may be agreed upon, and with the consent of three-fourths in interest of all the stockholders, by purchase, sale or otherwise, may merge and consolidate the stock, property, franchises and liabilities of such corporation, making the same one corporation, upon such terms as may be agreed upon, not in conflict with law. (C. 73, Sec. 1275; R. Sec. 1332.)"

The Illinois statute of 1885 reads as follows:

"Sec. 36. PURCHASE AND USE OF CONNECTING LINE PERMITTED—LINE IN OTHER STATE—EXCEPTIONS. Sec. 1. Be it enacted by the People of the State of Illinois, represented in the General Assembly: That all railroad companies now organized, or hereafter to be organized, under the laws of this state, which now are, or hereafter may be, in possession of and operating in connection with or extension of their own railway lines, any other railroad or railroads in this state, or in any other state or states, or owning and operating a railroad which connects at the boundary line of this state with a railroad in another state, are hereby authorized and empowered to purchase and hold in fee simple or otherwise, and to use and enjoy, the railway property, corporate rights and franchises of the company or companies owning such other road or roads, upon such terms and conditions as may be agreed upon between the directors and approved by the stockholders, owning not less than two-thirds in amount of the capital stock of the respective corporations becoming parties to such purchase and sale; such approval may be given at any annual or special meeting, upon sixty days' notice being given to all shareholders, of the question to be acted on, by publication in some newspaper published in the county where the principal business office of the corporation is situated; provided, that notice of any special meeting

called to act upon such question, shall be given to each shareholder whose postoffice address is known, by depositing in the postoffice, at least thirty days before the time appointed for such meeting, a notice properly addressed and stamped, signed by the secretary of the company, stating the time, place and object of such meeting: And, provided, further that no railroad corporations shall be permitted to purchase any railroad which is a parallel or competing line with any line owned or operated by such corporaton."

It will be noted that the Iowa statute authorized railway corporations by purchase, sale or otherwise, to merge and consolidate their stocks, property, franchises and liabilities, and form one corporation. While the Illinois statute in terms uses the word "purchase," this in effect has been held to be a consolidation.

Chicago, S. F. & Cal. Ry. v. Ashling, 56 Ill. App. 327;

Branch v. Jessup, 106 U. S. 467;

Muller v. Dow, 94 U. S. 447;

Walters v. C. B. & Q. Ry., 104 Fed. 377;

Continental Trust Co. v. Toledo, St. L. & K. C. Ry., 82 Fed. 652.

In Chicago, Santa Fe & California Railway v. Ashling, *supra*, the Illinois statute was fully considered. There it appeared that the Chicago & St. Louis Ry. Co. had conveyed all of the property to the Chicago, St. Louis & San Francisco Ry. Co., the latter exchanging its stock for the stock of the former. Referring to the 1885 law, the court said:

"It is claimed by plaintiff in error, and probably correctly, that the defendant in error

purchased the property of the Chicago & St. Louis Railway Company under the provisions of the above statute. But it is insisted that such purchase is not a consolidation of the two corporations in question within the meaning of the statute above quoted, making the consolidated company liable for the debts or liabilities of each company included in said consolidated company existing or accruing prior to such consolidation. We are of the opinion that this point is not well taken. While the statute denominates the transaction a purchase, the thing authorized to be done, and what was done in this case, was in fact a consolidation within the meaning of the term used in the above quoted statute. What was done in this case by the purchase? First, the plaintiff-in-error acquired the entire franchise held by the Chicago & St. Louis Railway Company held by its charter. Second, it issued by way of purchase of such franchise and property, its stock, dollar for dollar, to the stockholders of the absorbed corporation. Their rights as stockholders were simply changed from the selling to the purchasing company, and the stockholders in the latter company became common stockholders with them in that company. In other words, the stock and franchise and property of the two companies became common and are in the plaintiff-in-error; they were consolidated as effectually as they could have been in any other method. It is true that the plaintiff-in-error assumed the obligation of the bonded indebtedness of the Chicago & St. Louis Railway Company, but this was nothing more than doing by agreement what the statute imposed on the consolidated company without it."

Judge Taft, in Continental Trust Co. v. Toledo, St. Louis & Kansas City Ry., *supra*, commenting on this statute, said:

"Although this act uses the word 'purchase,' it plainly contemplates consolidation, and this is the holding in Illinois Railway Company v. Ashling, 56 Ill. App. 327."

The Ashling case was affirmed by the Supreme Court of Illinois under the same title in 160 Ill. 373. The court there said:

"The general rule that the consolidation of two or more corporations into one creates a new company and works a dissolution of the original corporations forming the consolidated company is subject to exceptions, and depends upon the statute under which the consolidation is effected. In Central Railroad, etc., Co. v. Georgia, 92 U. S. 665, it was said: 'It may be that the consolidation of two corporations,—or amalgamation, as it is called in England,—if full and complete, may work a dissolution of them both, and its effect may be the creation of a new corporation. Whether such be the effect or not must depend upon the statute under which the consolidation takes place and of the intention therein manifested.' We see no reason why, under the statutes in question, one corporation may not be consolidated with another under the name of such other, which is continued in existence with enlarged powers, franchises and property rights. It is, in substance, so provided, and such consolidations are frequently made. (Central Railroad, etc., Co. v. Georgia, *supra;* Racine and Mississippi Railroad Co. v. Farmers' Loan & Trust Co., 49 Ill. 331; Eaton and H. Railroad Co. v. Hunt, 20 Ind. 457; 4 Am. & Eng. Ency. of Law, 272; Meyer v. Johnson, 64 Ala. 656.) In the latter case it was said: 'When the rights, franchises and effects of two or more corporations are, by legal authority and agreement of the parties, combined and united into one whole, and committed to a single corporation, the stockholders of which are com-

posed of those (so far as they choose to become such) of the companies thus agreeing, this is, in law and according to a common understanding, a consolidation of such companies, whether such single corporation, called the consolidated company, be a new one then created or one of the original companies continuing in existence, with only larger rights, capacities and property.' We concur in this view as a general statement of the law, subject, however, to modification by the statutes under which the consolidation is effected.

"What was said in People ex rel v. Louisville and Nashville Railroad Co., 120 Ill. 48, and Ohio and Mississippi Railway Co. v. People ex rel., 123 id. 467, to the effect that by the consolidation the original companies ceased to exist and a new one was formed, was said not with reference to the statutes here in question, but in reference to other statutes under which the consolidations there considered were effected.

"We are of the opinion that as the question is here presented it must be held that there was a consolidation of the Chicago and St. Louis Company with the Chicago, Santa Fe and California Company, as alleged in the declaration."

In Chicago & Joliet Electric Railway Co. v. Ferguson, 106 Ill. App. 356, it was also specifically held that a consolidation, not a purchase, is effected by the transfer of the franchise and all the property of one corporation to another under an arrangement by which the stockholders of the former company exchanged their stock for stock of the latter company. The decision in this case, together with that in the case reported in 160th Illinois was formally offered in evidence in the court below. (Record, folios 122, 123.)

In Walters v. Chicago, Burlington & Quincy R'y Co., *supra*, the facts were these: The Burlington & Missouri River R. R. Co. in Nebraska, consolidated with the Chicago, Burlington & Quincy Co. by deeding all of of its property to that company in return for an issue of new stock of the Chicago, Burlington & Quincy Co. to the Missouri River Co. Judge Munger said:

> "The manner of consolidation was a sale of all of the property of the Nebraska corporation to the defendant company, and an issue of new stock of the defendant company to the stockholders and owners of the Nebraska corporation. That a consolidation may be effected by a sale of the property and franchises of one corporation to another without the creation of a new corporation is well established by the authorities."

It seems clear that what was done under the Illinois statute amounted to a consolidation within the meaning of these decisions.

The first mortgages of the Minnesota & Northwestern Co. and of the Kansas City Co. each contained the following provision:

> "And it is hereby further expressly agreed that in the event of default by the railway company in the payment of principal or interest of said bonds, or otherwise, a majority in interest of the bondholders for the time being, shall have the right to agree upon a plan or scheme of reorganization, which plan or scheme when agreed upon in writing, and signified to the trustee, shall govern their action thereto, and shall be in all respects binding and obligatory upon the holders of said bonds."

(Record, folios 166 and 265.)

The reorganization which resulted in the control by the Great Western Company was carried out strictly in accordance with this clause. The agreement was assented to by the trustees, and a deed of consolidation was executed by both companies after being authorized by substantially all the stockholders of both companies, who had deposited their stock and come in under the reorganization. The deed recited the construction of the road of the Minnesota & Northwestern Co., its acquisition by the Kansas City Co., and the making of the mortgage by both those companies, including therein the plan of reorganization. The deed further recited the terms and conditions under which the stock of the Great Western Co. was exchanged for stock and bonds and other securities of the Kansas City Co., and then in order to carry out said consolidation and reorganization, all of the property, rights, franchises, privileges and immunities of the Kansas City Co. were conveyed to the Great Western Co. This consolidation was not only strictly in conformity with the Illinois laws, and held to be a consolidation by the Illinois courts, but it was literally within the terms of the Iowa statute, which provided that the consolidation might be made by "purchase, sale, or otherwise." The form of the deed in such a case is immaterial, but in any event the consolidation was not only by sale, but by an exchange of securities.

The Iowa statute was considered by the Supreme Court of the United States in Muller v. Dows, 94 U. S. 477, where the court said:

> "It is true the provisions of the statutes of Iowa, respecting railroad consolidation of roads within the state with others outside of the state, were that any railroad company, organized under the laws of the state, or that might be thus organized, should have power to intersect, join and unite their railroads constructed or to be constructed in the state, or in any adjoining state, at such point on the state line, or at any other point, as might be mutually agreed upon by said companies; and such railroads were authorized to 'merge and consolidate the stock of the respective companies, making one joint stock company of the railroads thus connected.' The Missouri statutes contained similar provisions; and with these laws in force the consolidation of the Chicago and Southwestern Railways was effected. The two companies became one. But in the state of Iowa that one was an Iowa corporation, existing under the laws of that state alone. The laws of Missouri had no operation in Iowa."

On the proposition that consolidation statutes framed in general terms include consolidation with railways of any state, see:

> Day et al. v. O. & L. C. R. Co., 107 N. Y. 140;
> Railroad Companies v. Keokuk, &c., Co., 131 U. S. 388.

That there is no legal difficulty in computing the gross earnings tax upon part of the road operated by the consolidated company, is apparent from the Koerner case in 85 Minnesota, and from the Milwaukee case in 23rd Minnesota. It is a matter of public knowledge that all roads in Minnesota under their charters required to pay a percentage of gross earnings as a tax, divide their earnings on the basis of the mileage of freight and passengers carried, and report the same to the State for taxation.

V.

THE LEGISLATURE OF THE STATE HAS NO POWER TO REPEAL, AMEND OR MODIFY THE CHARTER BY CHANGING THE RATE OF TAXATION.

It will be recollected that the charter as originally adopted contained no reservation of a power to repeal or amend. Chapter 58 of the Laws of 1855, however, which re-enacted the original charter and amended the same, did contain a reservation reading as follows:

> "The legislature of the Territory or future State of Minnesota may repeal, amend or modify this Act and the Act to which this is amendatory, from and after the expiration of twenty years from the date of the passage of this Act. Provided, that compensation be made to said company for all damages sustained thereby."

This Act provided for its acceptance by the company as part of its original charter by the filing of a certificate to that effect; and the Act was duly accepted. The provision for a commuted gross earnings tax, upon which reliance is now placed, did not appear until the Act of 1856. That Act also provided that its terms were to be accepted by the company as part of its original charter, "as approved by the Governor of this Territory on the 4th day of March, 1854."

The 1856 law contains of itself all of the elements necessary for the making of a specific contract between the Territory and the company with respect to taxation. No reference is made to right

to repeal or amend, nor even to the Act of 1855. The only reference is to the original charter of 1854.

Under the rule laid down by this Court in New Jersey v. Yard, 95 U. S. 104, the reserved right to repeal or amend on making compensation for damages, cannot be held to apply at all to the contract for the commuted tax provided for in the Act of 1856. In that case it appeared that the Morris & Essex Railroad Company was incorporated by act of the New Jersey legislature passed in 1835. This act provided that as soon as the net proceeds of the road amounted to seven per cent on its cost, the company should pay a tax of one-half of one per cent on the cost annually thereafter in lieu of all other taxes or imposts. The 20th section of the same act reserved the right to alter, amend or repeal. A supplement to the charter, passed in 1836, gave power to build branch lines, and repealed the 20th section of the original charter, but reserved the right of the legislature to alter or amend the supplement, or the act to which it is a supplement, whenever the public good might require it. In 1846 a general act relating to corporations was passed, providing that the charter of every corporation thereafter granted should be subject to alteration, suspension and repeal at the discretion of the legislature. In 1862 a general tax act provided that all private corporations except those which, by virtue of irrepealable contracts in their charters, were expressly exempt form taxation, should be taxed at the full amount of their capital stock. This act

repealed all acts and parts of acts, special, local or otherwise, inconsistent with its provisions. Another supplement to the original charter was passed in 1865, authorizing a certain branch road, subject to all the restrictions, limitations and conditions of the original acts and supplements, which might be applicable. The third section of this 1865 law provided that the tax of one-half of one per cent, provided by the original act of incorporation, should be paid at the expiration of one year from the time when the road was opened and in operation as far as Philipsburg, and annually thereafter, the tax to be in lieu of all other taxation. This section was not to go into effect or be binding upon the company until, by an instrument duly executed under its corporate seal, it should have signified its assent thereto, such assent to be given within sixty days after the passage of the law. This supplement was duly accepted by the company according to its terms. In 1867 the legislature enacted another supplement to the charter, reciting that the company had extended its railroad to Philipsburg, and giving power to increase its stock and straighten its road. It was also provided that no tax should be imposed upon the company except the tax of one-half of one per cent on the cost, as required by the charter and supplement of 1865. There was no formal acceptance of this act provided for or given. In 1873 a general law was passed providing for the taxation of railroads in a different manner than that provided in the charter of the company. Under this last law the Tax

Commissioner undertook to tax the property of the company, and it was held eventually by this Court that as applied to the company the 1873 law was an impairment of the obligation of its contract with the State. The contention made by the State in the New Jersey case was exactly the same made by the State here, to-wit, that the language of the repeal clause found in the first amendatory act was applicable to the contract provided for in the second amendatory act. The provision of the first amendatory act in the New Jersey case was that "this supplement and the charter to which it is a supplement, may be altered or amended by the legislature." The court held that this provision did not apply to the subsequent supplemental act providing for the commuted system of taxation, that act not containing any proviso relating to repeal or amendment.

The language of Section 9 of the 1855 law is almost identical in effect with that found in the New Jersey supplemental act, to-wit, that "the legislature of the Territory or future State of Minnesota may repeal, amend or modify this act and the act to which this is amendatory * * *." We can see absolutely no room for distinction between the New Jersey case and the one now before us.

However, even conceding the applicability of the repeal clause found in the 1856 law, the case of the State is no better off, because the repeal or amendment could not be affected without providing for all damages sustained. Manifestly, an amendment

of the charter, raising the rate of taxation from two to four per cent, operates to the company's detriment or damage to the extent of the exact difference between the taxes called for by these rates respectively.

But the obvious meaning of the repeal clause in the Act of 1855 did not appeal to counsel for the State in their argument below. The absurd limit to which legal ingenuity can be carried in such matters is well illustrated by their position on this subject. The last section of their brief was devoted to an elaborate attempt to show that the proviso requiring compensation for damages sustained by any repeal or modification is to be accorded no force in this case.

Two suggestions were advanced: First, that the proviso does not cover the subject of taxation; and Second, that in any event it is to be treated as surplusage. The first of these positions is subdivided into two propositions: one that the history of the charter and the conduct of the defendant and its predecessors prove the proviso does not appertain to taxation; and the other that taxes are really not contemplated in the term damages. The arguments in favor of these contentions are interesting, but not convincing.

On the subject of the history of the charter and the conduct of the contracting parties, the amazing statement is made that because the State and the Minnesota & Northwestern Co. in the following year saw fit by agreement to amend their contract with particular reference to the form of taxation,

it follows that the proviso in the Act of 1855 did not refer to taxation.

The conclusion and the premise in this argument seem to be hopelessly divorced. We can find no connection between the two and counsel's brief did not supply the deficiency; we think it doubtful whether in this court such an argument will be advanced. There could have been no question of a violation of the company's contract rights by the Act of 1856. The company could have accepted or rejected the proposition then made by the State. It accepted the proposition and thereby added to the contract formerly existing, a stipulation as to the form of taxation.

When it came to the question of the meaning of the word damages in the proviso, the suggestion was twofold—first, that the proviso was inserted as a matter of sentimental tenderness on the part of the legislature, and second, that anyhow the State needed the taxes and the plaintiff-in-error ought not to complain of a uniform and equal system of taxation. Neither of these ideas appeals to us as worthy of serious attention.

Having thus argued that the proviso does not apply to taxation, and that anyhow it was passed because the legislature did not desire to appear to be harsh, counsel next argued that the proviso meant nothing at all—was mere surplusage. The reason for this last assertion was most curious. It was asserted that if the proviso was taken to mean just what it says, then the damages would be exactly equal to the additional tax proposed by the

attempted amendment. Just why there should be anything objectionable in that result, we are unable to see; but counsel urged that the fact was conclusive as showing that the proviso was surplusage. We cannot follow this line of reasoning. Why should not the compensation to the company be complete? If the State desires to raise the rate applicable to this company so that it shall be uniform with that applied to other roads, it may do so; but in that event, the contract between the parties requires that compensation shall be made "for all damages sustained" by the company. Of course the damages will be equal to the increased tax, but that does not make the proviso repugnant to the power to amend. The power of eminent domain, for instance, is granted upon a similar condition of rendering full compensation. The fact that the damages arising from the exercise of the power are equal to the value of the thing taken, does not render the proviso for compensation repugnant to the power exercised.

VI.

AT THE TIME OF THE CONSTRUCTION OF THE ROAD, IN 1885, AT THE DATE OF THE CONSOLIDATION WITH THE CHICAGO, ST. PAUL & KANSAS CITY RAILWAY COMPANY IN 1887, AND AT THE DATE OF THE LAST CONSOLIDATION, WITH THE PLAINTIFF-IN-ERROR IN 1893, THE LAW HAD BEEN SO LONG SETTLED BY THE SUPREME COURT OF MINNESOTA, THAT CONTRACTS OF THE NATURE OF THE ONE UNDER CONSIDERATION WERE APPURTENANT TO THE PROPERTY AND WOULD PASS TO A SUCCESSOR CORPORATION, THAT SUCH HOLDINGS HAD BECOME A RULE OF PROPERTY UPON WHICH INVESTORS WERE ENTITLED TO RELY, AND THE RULE COULD NOT BE THEREAFTER CHANGED BY SUCH COURT SO AS TO AFFECT THE RIGHTS AND OBLIGATIONS OF THE PLAINIFF-IN-ERROR.

As we have shown by the decisions, the law in Minnesota had, by repeated adjudications, been thoroughly established for years. Without variation, whenever the question was presented, the Supreme Court had held that these particular contract rights, created and established by the so-called "territorial charters" granted to railroads, were appurtenant to the property and were not personal to the corporation originally entering into the contract. There had never been a departure from this rule of construction until the decision of the Supreme Court of Minnesota in the present case and in the companion case against the Great Northern Railway Company.

The law being thus established, Chapter 83 of the Special Laws of Minnesota for 1883 was passed, authorizing the Minnesota & Northwestern Rail-

road Company to consolidate its stock, franchises, rights and property with that of any other railroad company which would undertake the construction and operation of the railroad which the Minnesota & Northwestern Railroad Company was authorized to construct and operate, and further authorizing the company to survey, locate, construct, complete, alter, maintain and operate as a railroad, with one or more tracks, a line from such a point on the northern boundry of the State of Iowa as the Board of Directors of said corporation might designate, northerly, by way of the cities of St. Paul and Minneapolis, to the northern boundry of the State. This act, as will be seen by an inspection of the same, was entitled "An Act to Amend the Charter of the Minnesota & Northwestern Railroad Company." In Section 1 of the act the corporation was described as having been incorporated under the act of 1854 and the acts amendatory thereto, which would, of course, include the act of 1856, establishing the rate of taxation.

As found by the Railroad & Warehouse Commission of Minnesota when they certified that the Chicago Great Western Railway Company should be taxed only at the rate of 2 per cent, which certificate was made after full hearing (Record, folios 97 to 107), the road was constructed by the Minnesota & Northwestern Railroad Company between the date of the act of 1883 and June 30, 1886. The Minnesota & Northwestern operated the road to December 8, 1887, when the consolidation with the Chicago, St. Paul & Kansas City Railway took

place. The latter line, as we have shown, owned another line of road in the State of Iowa, and its stockholders may naturally be assumed to have been influenced, in agreeing to this consolidation, by the fact that not only the Minnesota & Northwestern Company but any successor corporation maintaining and operating the road of that company would, under the contract contained in the charter and the law as repeatedly expounded by the Supreme Court of Minnesota, pay only 2 per cent on the gross earnings on such portion of the road as was located in the State of Minnesota. The same considerations must be deemed to have influenced the persons interested in the Chicago Great Western Railway Company at the time of the consolidation of 1892. It would seem that if it is ever possible for the courts to establish a rule of property which cannot be thereafter changed to the detriment of persons acting in reliance thereon, such a case is here presented.

In the case of Traverse County v. St. P. M. & M. R. Co., 73 Minn. 417, the Minnesota court recognized the force of this rule. We quote from the opinion of that case:

> "Whatever errors of law, if any, may be involved in the practical or judicial construction of either constitution or statutes on the subject of the taxation of 'land grant' lands of the old territorial railroad companies or their successors, after that construction has been adopted and acted upon by all departments of the Government, and generally acquiesced in for so many years, it must now be adhered to. It is now too late to think of undoing the past.

> All these years the defendant has been paying, and the State accepting, taxes on these lands in the substituted or commuted form of a percentage of the gross earnings of the road."

In the Revised Laws of Minnesota for 1905, which was a very careful revision made by a commission and approved by the Legislature, Section 2895, which provides for the purchase or lease of one railroad by another, not only confers upon domestic and foreign corporations alike the power to purchase, but contains the following specific provision:

> "The corporation so leasing or purchasing shall be subject to any law of this state now in force or hereafter enacted relating to the taxation of the property so leased or purchased."

So that if a contract existed under a law of Minnesota providing a rate of taxation,—whether it was made by a special act, as in the case under consideration, or by general law made applicable to a particular corporation,—a purchasing road would take the property subject to such law. This is another indication of the policy of this State, that such provisions, or contracts, have never been deemed personal but that they would follow the property.

In the cases of State v. Winona & St. Peter Railroad Co., 21 Minn. 315, and County of Stevens v. Minneapolis & Manitoba Railroad Company, 36 Minn. 467, the fact that the decisions had established a rule of property in this state was decided. We quote from the Stevens County case, pp. 470, 471:

"That the exemption from ordinanry taxation, created in 1857 in favor of the Minnesota & Pacific Railroad Company, subsequently passed with the lands, and as a right appendant thereto, to the St. Paul & Pacific Railroad Company and to the First Division of the St. Paul & Pacific Railroad Company, may be now accepted without question. It was so decided 8 years ago in the case of the last named Company v. *Parcher*, 14 Minn. 224, (297), which decision has been ever since followed." (Citing six subsequent cases.) "In the *Parcher case, supra*, the doubt was expressed as to whether the granted immunity from taxation was a *franchise* of the Minnesota & Pacific Company, which, after resumption by the state, had been included as such in the franchises reconferred upon the St. Paul & Pacific Company. The decision in that case was not put upon that ground, but its correctness has received support from a late decision of the supreme court of the United States declaring an immunity from taxation to be a *franchise*. *Given v. Wright*, 117 U. S. 648, (6 Sup. Ct. Rep. 907). We are not disposed to reconsider a question so long settled, and so often recognized as settled, in this court; and will only add that we do not think that the decision in the *Parcher* case, sustaining the exemption in favor of the successors of the Minnesota & Pacific Railroad Company, has ever been disturbed by the decisions of the supreme court of the United States."

The decision from which we have just quoted was handed down on March 2, 1887. The contract for the consolidation of the Minnesota & Northwestern Railroad Company with the Chicago, St. Paul & Kansas City Railway Company as said above was dated the 8th of December, 1887 (Record, folio 18). It would seem that the parties were entitled to

rely upon this decision as a rule of property, following as it did a large number of previous opinions of the Supreme Court to the same effect. As to the great weight to be given to a long continued practical construction of a statute by the judicial, legislative and executive departments where property rights have grown up on the faith of such construction, this court has repeatedly expressed itself; and the Supreme Court of Minnesota has uniformly agreed with the views of this court.

McCullough v. Maryland, 4 Wheat. 316.

Brown v. United States, 113 U. S. 568, 570.

United States v. Hill, 120 U. S. 169, 180.

Knowlton v. Moore, 178 U. S. 41.

Carson v. Smith, 5 Minn. (G.) 61.

Loring v. Benedict, 15 Minn. 198, 203.

City of Faribault v. Misener, 20 Minn. 396.

Ames v. Railroad Co., 21 Minn. 241, 288-9.

H. & D. R. R. Co. v. Whitney, 34 Minn. 538.

Green v. Knife Falls Boom Co., 35 Minn. 155, 161-2.

Willis v. Mabon, 48 Minn. 140, 149-50.

State v. Luther, 56 Minn. 156, 164-5.

Cameron v. C. M. & St. P. Ry., 63 Minn. 387.

State v. Moffett, 64 Minn. 292.

Traverse County v. St. P. M. & M. R. Co., 73 Minn. 417.

State v. Northern Pacific Ry. Co., 95 Minn. 43.

State v. Evans, 99 Minn. 229.

We therefore respectfully urge that the parties who, in reliance upon these numerous decisions of

the Supreme Court of Minnesota, invested their money in good faith in the construction, enlargement and extension of this railroad are entitled to the protection of this court.

Respectfully submitted,

FRANK B. KELLOGG,
CORDENIO A. SEVERANCE,
ROBERT E. OLDS,
A. G. BRIGGS.
For Plaintiff-in-Error.

JOHN BARTON PAYNE,
GENERAL COUNSEL.

Supreme Court of the United States.

OCTOBER TERM, 1909.

NO. 377.

CHICAGO GREAT WESTERN RAILWAY COMPANY,
Plaintiff-in-Error,

vs.

STATE OF MINNESOTA,
Defendant-in-Error.

On Writ of Error to the Supreme Court of Minnesota.

APPENDIX TO
BRIEF OF PLAINTIFF-IN-ERROR.

CHARTER OF THE MINNESOTA & NORTHWESTERN RAILROAD COMPANY (THE PREDECESSOR OF THE CHICAGO GREAT WESTERN RAILWAY COMPANY), AND ACTS OF THE LEGISLATURE OF THE TERRITORY AND STATE OF MINNESOTA AMENDATORY THEREOF AND SUPPLEMENTAL THERETO:

Chapter 47, Laws of Minnesota 1854.

An Act to Incorporate the Minnesota and Northwestern Railroad Company.

Be it enacted by the Legislative Assembly of the Territory of Minnesota:

That Robert Schuyler, William P. Burrall, George L. Schuyler, Morris Ketchum, Edward Bement, R. B. Mason, George W. Billings, of the City of New York; Erastus Corning, of the City of Albany; John M. Forbes, Curtus B. Raymond and John Gardner, of the City of Boston; Wyman B. S. Moore, of the city of Bangor, Maine; and Frederic S. Jesup, of the city of Dubuque, Iowa; and Franklin Steele, Charles W. Borup, Orange Walker, Alex. Wilkin, Willis A. Gorman, Alex. Ramsey, James Stinson and J. Travis Rosser, of the Territory of Minnesota, and all such persons as shall hereafter become stockholders in the company hereby incorporated, shall be a body politic and corporate, by the name and style of the "Minnesota and Northwestern Railroad Company," and under that name and style, shall be capable of sueing and being sued, impleading and being impleaded, defending and being defended against, in law and equity, in all courts and places whatsoever, in like man-

ner, and as fully as natural persons may make and use a common seal and alter and renew the same at pleasure, and by their said corporate name and style shall be capable in law of contracting and being contracted with; shall be and are hereby invested with all the powers, privileges, immunities and franchises, and of acquiring by purchase or otherwise, and of holding and conveying real and personal estate which may be needful to carry into effect fully the purposes and objects of this act.

Sec. 2. That the corporators specifically named in the preceding section, shall meet in the city of New York, at the room of the Chamber of Commerce, in the Merchants' Exchange, on the next first Tuesday in a month succeeding that in which this act shall be passed, which said time of meeting shall be not less than thirty days nor more than sixty days after the passage of said act. And it shall be the duty of said corporators, at their first meeting, to determine whether or not they accept the charter, and if the same be accepted, to give notice immediately of such acceptance to the Governor of the Territory of Minnesota, by certificate to that effect, signed by the corporators present, but not under seal, properly addressed and deposited in the Post Office in the city of New York. It shall also be the duty of the corporators, at their first meeting, to make such arrnagements as may be proper and necessary, for future meetings, for the organization of the company, and the issue of capital stock.

Sec. 3. It shall be the duty of the above named corporators within sixty days after the acceptance of this charter, to cause to be opened at some designated place in the city of New York and in the city of St. Paul in this Territory, books, for subscriptions to so much of the capital stock of said company as they may deem proper, giving twenty days notice thereof in one or more public newspapers printed in the City of New York and in the city of St. Paul, aforesaid; and after a sum of not less

than one million of dollars of the capital stock of said company shall have been subscribed and an instalment of not less than ten per cent. paid upon each share, than the subscribers shall become corporators of said company, and shall within thirty days thereafter, proceed to elect a board of directors, which shall consist of not less than twelve stockholders, citizens of the United States of America, and three of them shall reside in the Territory, or future State, of Minnesota; and said directors, so elected, shall within ten days thereafter, proceed to organize by the election of a president, and such other officers as they may see fit to appoint, and until such organization the corporate powers of said company shall remain in, and be exercised by the corporators hereinbefore specified.

Sec. 4. From and after the organization of the said board of directors, all the corporate powers of said company shall be vested in and controlled and exercised by said board of directors, and such officers and agents as they shall appoint; three of whom shall hold the office of director for one year, three others for two years, three others for three years, and the remaining three for four years; the time which each of the first board of directors shall hold his term of office to be determined by lot, within thirty days, after the first organization of said board. At the expiration of the term of one year from the organization of said board, and every succeeding year thereafter, there shall be chosen three directors from among the stockholders of said company, due notice of such election having been first given by the Board of Directors, to supply the vacancies of those who go out, and each director shall continue in office until his successor is elected and assumes the trust conferred on him. Vacancies in the board may be filled by a vote of two-thirds of the directors remaining; such appointees to continue in office until the next regular election of directors, but no person

shall be so elected, who shall not have been openly nominated at a meeting of the directors, at least one week before the time appointed for such election. Other officers, agents and servants, whether members of the board or otherwise, shall be entirely subject to the control of the board. In every election of directors, or for any other purpose, each share of capital stock shall be entitled to one vote, to be given in person or by proxy; a majority of the board of directors shall constitute a quorum for the transaction of business.

Sec. 5. The said directors shall have power to make, ordain and establish, all such by-laws, rules and regulations, as may be deemed expedient and necessary to fulfill the purposes, and carry it into effect the provisions of this act, and for the well ordering, regulating, and securing the affairs and business of the company, and such by-laws, rules and regulations shall have the force and effect of law; *provided*, that the same be not repugnant to the constitution and laws of the United States, or repugnant to the laws of the Territory, or future State, of Minnesota, or to this act. The board of directors shall have power to establish such rates of toll for the conveyance of persons and property upon the railroad by this act authorized to be built, as they shall from time to time by their resolutions direct and determine; and to levy and collect the same for the use of the said company; the transportation of persons and property, the width of track, the construction of wheels, the form and size of cars, the weight of loads, and all other matters and things respecting the use of said road and the conveyance of passengers and property shall be exclusively within the control of said board of directors, and in conformity with such rules and regulations as they shall from time to time determine. Said board of directors may have power to hold its meetings in the city of New York, and to order and hold all elections for directors in said city.

Sec. 6. The capital stock of said corporation shall be ten millions of dollars, which may be increased from time to time to any sum not exceeding the entire amount expended on account of said road divided into shares of one hundred dollars each, which shall be deemed personal property, and may be issued and transferred in such manner and at such places, as may be ordered and provided by the board of directors, who shall have power to require the payment of sums subscribed by stockholders, in such manner and on such terms as they may deem proper, and on refusal or neglect on the part of the stockholders or any of them, to make payments on the requisition of the board of directors, the shares of such delinquent may, after thirty days' public notice, be sold at public auction, under such rules as the said board of directors may adopt; the surplus money, if any remains, after deducting payments due, with the interest and necessary costs of sale, to be paid to such delinquent stockholders; books for subscriptions to stock shall be opened by the board of directors in the city of New York, and in the city of St. Paul, and may be opened in the city of London, from time to time, as said directors may order.

Sec. 7. The said corporation is hereby authorized and empowered, to survey, locate, construct, complete, alter, maintain and operate as a railroad, with one or more tracts or lines of rails, from a point on the North-West shore of Lake Superior in Minnesota Territory, north of the St. Louis River, opposite the entrance of the Left-Hand River into Lake Superior; and near the mouth of the St. Louis River, Minnesota, on Lake Superior, by way of St. Anthony and St. Paul, Minnesota, and cross the Mississippi at St. Paul to such point on the northern boundary line of the State of Iowa, as the board of directors may designate; which point shall be selected with reference to the best route to the city of Dubuque. *Provided*, that such location shall conform in all

respects, to such route as may be designated in any act of Congress granting lands for the construction of the said railroad.

Sec. 8. The said corporation shall have the right of way upon, and may appropriate to its sole use and control, for the purposes contemplated herein, by paying therefor in the manner hereinafter provided, land not exceeding two hundred feet in width, through its entire length, may enter upon and take possession of and use all and singular said lands, two hundred feet in width and all streams, minerals and materials of every kind thereon, for the location of depots and stopping stations, for the purpose of constructing bridges, dams, embankments, excavations, station grounds, spoil-banks, turnouts, engine houses, shops and other buildings, necessary for the construction, completing, altering, maintaining, preserving and complete operation of said road. All such lands, waters, minerals, materials and privileges belonging, or which may hereafter belong to the Territory, or future State of Minnesota, on and within said two hundred feet in width, are hereby granted to said corporation, for said purposes and for no other; and for the purpose of aiding the said company in the construction and maintaining the said railroad, it is further enacted that any lands that may be granted to the said Territory to aid in the construction of the said railroad, shall be and the same are hereby granted in fee simple, absolute, without any further act or deed, and the Governor of this Territory or future State of Minnesota, is hereby authorized and directed, in the name and on behalf of said Territory or State, after the said grant of land shall have been made by the United States to said Territory, to execute and deliver to said company such further deed or assurance of the transfer of said property, as said company may require to vest in them a perfect title to the same. *Provided, however*, that such lands shall be taken and held upon such terms and conditions

as may be prescribed by the Act of Congress granting the same. *Provided, also,* whenever the net earnings of said road shall exceed twenty per cent. on the amount of capital actually expended by said company in the construction and furnishing of said road and appurtenances, said corporation shall pay semi-annually to the Treasurer of the Territory or future State of Minnesota, and take his receipt for the same, seven per cent. of the said net earnings of said railroad.

Sec. 9. Said company may take such lands for the construction of said road as may be deemed requisite by said corporation, but unless the lands so taken shall be purchased or voluntarily given for the purposes aforesaid, proper compensation for the land so taken, shall be made, which shall be ascertained and determined in the manner following: The said party or parties interested may present to the circuit, or district, or county court of the circuit or district, or county where said lands or real estate proposed to be taken shall lie, a petition signed by its attorney, or agent, describing with convenient accuracy and certainty, by map or otherwise, the lands or real estate so required to be taken as aforesaid, setting forth the name and residence of each owner or other person interested therein, as owner, lessee, incumbrancer, as far as known to such attorney, or agent, or appearing of record and praying the appointment of commissioners, to ascertain the compensation to be made such owners and others interested, for the taking or injuriously affecting such land or real estate as aforesaid. The court shall have satisfactory evidence that notice of an intended application, and the time and the place thereof, for the appointment of commissioners of appraisement between said corporation and the owners and persons interested in such lands and real estate had been given at least ten days previously to such owners personally, or to their agent or attorney, at their residence or on the premises, or by

publication thereof for four weeks previous to such application, in any newspaper, printed in the county in which said lands or real estate may be, or if no newspaper be printed in said county, in a newspaper printed at the Capitol of this Territory and also in a newspaper published at the shortest distance within said Territory or State from the place where the land lies; such publication to be allowed only in respect to owners who shall appear by affidavit to have no residence in the county known to such agent or attorney, whereat such notice could be delivered as aforesaid. The Court may adjourn the proceedings from time to time, it may direct any future notice thereof to be given that may seem proper, it shall take proofs and allegations of all parties interested touching the regularity of the proceedings, and shall by an entry in its minutes, appoint three competent and disinterested persons, who shall be free holders of said county, commissioners to ascertain such compensation as aforesaid, specifying in such entry a time and place for the first meeting of such commissioners. The said commissioners before entering upon the duties of their office, shall take the oath required by the laws of this Territory or the future State of Minnesota, and any one of them may administer oaths to witnesses produced before them, and may adjourn from time to time. Whenever they shall meet to hear proofs and allegations, unless by appointment of the court, or pursuant to adjournment, they shall cause ten days previous notice of such meetings to be given to the said owners or parties interested or their attorney, or agent, and may, each of them issue subpoenas, and compel witnesses to appear and testify; they shall hear the proofs and allegations of the parties, and any three or more of them, after reviewing the premises without fear or favor, or partiality, ascertain and certify the compensation proper to be made to the said owners and parties interested, for the lands or real estate to be

taken, as well as all damages accruing to the owner of the lands and real estate aforesaid, taken in consequence of the condemnation of the same, or injuriously affected as aforesaid, may in their discretion assess a separate, reasonable sum in favor of such owners and parties interested, or of any person appointed by the court to appear as attorney for them, for costs, expenses and reasonable counsel fees. They, or a majority of them shall make, subscribe and file with the clerk of the county in which such lands or real estate shall lie, a certificate of their said assessment, in which such lands or real estate shall be described by map or otherwise, with convenient accuracy and certainty. The court upon such certificate and due proof that such compensation and separate sums, if any be certified, have been paid to the parties entitled to the same, or have been deposited to the credit of such parties in the State treasury, or other place for that purpose, approved by the court, shall make and cause to be entered in its minutes, a rule describing such lands or real estate, in manner aforesaid, such ascertainment of compensation, with the mode of making it, and such payment or deposit of the same compensation as aforesaid, a certified copy of which rule shall be recorded and indexed in the proper recording office, in like manner and with the like effect as if it were a deed of conveyance from the said owners and parties interested to the said corporation. Upon the entry of such rule, the said corporation shall become seized in fee of all the land and real estate, described in said rule, as required to be taken as aforesaid during the continuance of the corporation, by this or any subsequent act, and may take possession of, and hold, and use the same for the purposes of said road, and shall thereupon be discharged from all claims for any damages, by reason of any matter specified in said petition, certificate or rule of said court. If, at any time after an attempted or actual ascertainment of compensation, un-

der this act, or any other act, or any purchase by, or donation to said corporation of any lands for the purposes aforesaid, it shall appear that the titles acquired thereby to all or any part of such lands for the use of said road, or if the title of said corporation shall fail or be deemed defective, the said corporation may proceed anew to perfect such title, by procuring an ascertainment of the compensation proper to be made to any person or persons, whose title, claim or interest in, or lien upon such land, and by making payment thereof in the manner hereinafter provided, as near as may be, and at any stage of such new proceedings, or of any proceedings under this act, the court or officer to whom the application shall be made, may by a sale in that behalf made, authorize the said corporation, if already in possession, and if not in possession, to take possession of and use such premises during the pendency, and until the final conclusion of such proceedings and may stay all actions and proceedings against said corporation, on account thereof. *Provided*, such corporation should pay a sufficient sum into court, or, give security to be approved by said court, to pay the compensation in that behalf, when ascertained, and in every case, where possession shall be authorized, it shall be lawful for the owners to conduct the proceedings to a conclusion, if the same shall be delayed by the company. The said commissioners shall be entitled to receive from said corporation a compensation not exceeding five dollars for each day actually employed by them in the discharge of their duties. Such compensation to be taxed and allowed by the court, and which shall be paid by said corporation. If any commissioners so appointed shall die, be unable, or fail to serve, the court may appoint another in his place, on reasonable notice of the application, to be approved by the court, the proceedings hereby authorized may be had in the District court of any county where the lands lie,

and all motions to the District court shall be made at a general or special term thereof, in said county. The said commissioners shall file the said certificate in the office of the clerk of the District court of the county where the lands to be affected may lie, and any clerk shall, when presented with an order from the court for that purpose, transfer a certified copy of the same, and the proceeding connected therewith, to the clerk of any other county in which any portion of the lands to be affected may lie, whenever such clerk shall be so required by said corporation, its agent or attorney.

Sec. 10. For the purpose of raising funds from time to time, for the construction and completion of said road, and the purchase of iron and other materials, to be used thereon, and for other purposes connected with the construction and completion of said road, said company may issue its bonds in such form and for such amounts and at such rates of interest, payable at such time and places as the said board of directors may by their by-laws direct. The payment of said bonds may be secured by a deed of trust or mortgage of the franchise, lands, road and materials belonging to said company or all or either of them; *Provided*, that the faith of the Territory or future State of Minnesota, shall be in no wise pledged for the redemption of said bonds, and that no banking privileges are hereby granted to said company.

Sec. 11. If any person, shall carelessly, wilfully, maliciously, or wantonly, delay or obstruct the passage of any carriage on said road, or shall place or cause to be placed any material thereon, or in any way trespass upon, spoil, injure, or destroy said road or any part thereof, or anything belonging or pertaining thereto, or employed or used in connection with their location, survey, construction or management, all persons committing or aiding and abetting in the commission of such trespass or offense, shall forfeit and pay to the said company treble such

damages as shall be proved before any court of competent jurisdiction, and shall be imprisoned until the payment thereof, unless sooner discharged by due proceedings of law, and further, such offender shall be liable to indictment in the county within whose jurisdiction the offense may be committed, and to pay a fine of not less than thirty, nor more than one thousand dollars, to the use of the people of the Territory and future State of Minnesota; or may be imprisoned in the penitentiary or jail, for a term not exceeding five years, in the discretion of the court before whom the same shall be tried.

Sec. 12. Said corporation may construct their said road over or across any stream of water, water course, road, highway, railroad or canal, not, however, in such a manner as to interrupt or impede the navigation of any navigable stream or highway; and all roads or railroads, laid out subsequently to the completion of any part of the said railroad which may cross or intersect the same, shall be laid out, and constructed at the point of intersection in a manner that will do the least damage to said Railroad. Whenever the track of said railroad shall cross a road or highway, such road or highway may be crossed at grades or carried under or over said track, as may be found most expedient; and in case where an embankment or cutting shall make a change in the line of such road or highway desirable, with a view to a more easy ascent or descent, the said company may take such additional lands for the construction of such road or highway as may be deemed requisite by said corporation, unless the lands so taken shall be purchased or voluntarily given for the purposes aforesaid. Compensation shall be ascertained in the manner in this act provided, and duly made by said corporation to the owners and persons interested in such lands. The same, when so taken or compensation made, to become a part of such intersecting road or highway, in such manner

and by such tenure as the adjacent parts of the same highway may be held for highway purposes: *Provided*, that the present or any subsequent Legislature of the Territory or future State of Minnesota, may authorize any railroad or highway to cross or intersect the said railroad, on such terms as will do the least damage to the said railroad company.

Sec. 13. Every conductor, baggagemaster, engineer, brakeman or other servant of such corporation, employed in a passenger train or at stations for passengers, shall wear upon his hat or cap a badge which shall indicate his office, the initial letters or style of the corporation. No conductor or collector, without such badge, shall demand or be entitled to receive from any passenger any fare, toll or ticket, or exercise any of the powers of his office, and no other of said officers or servants, without such badge, shall have any authority to meddle or interfere with any passenger, his baggage or property.

Sec. 14. A bell of at least thirty pounds weight, or a steam whistle, shall be placed on each locomotive engine, and shall be rung or whistled at the distance of at least eighty rods from the place where said road shall cross any other road and be kept ringing or whistling at intervals until it shall have crossed said road or street, under a penalty of fifty dollars for every neglect, to be paid by said corporation, one-half thereof to go to the informer, and the other half to the Territory or future State of Minnesota, and to be liable for all damages which shall be sustained by any person by reason of such neglect. Said corporation shall cause boards to be placed, well supported by posts or otherwise, and constantly maintained across each public road or street, where the same is crossed by the railroad, on such elevation as not to obstruct the travel, and to be easily seen by travelers, and on each side of said board shall be printed in capital letters, of at least the size of nine inches each the words

RAILROAD CROSSING! LOOK OUT FOR THE CARS! But this provision shall not apply to streets of cities or villages, unless the corporation be required to put up such boards by the officers having charge of such streets. Said company shall construct and maintain a good and substantial board or rail fence five and one-half feet high, along said Railroad in the line of the lands by this act granted them, and shall construct and maintain cattle guards, wherever the same may be necessary, sufficient to keep cattle, sheep, horses and hogs from and off the track of said Railroad, and shall be liable for all damages sustained by any person by reason of any neglect to keep and maintain such fence and cattle guard in good repair.

Sec. 15. Said corporation shall, within a reasonable time after said road shall have been permanently located, cause to be made a map and profile thereof, and of the land taken and obtained for the use of said road, and file the same in the office of the Secretary of the Territory or of the future State of Minnesota, and also like maps of the parts thereof located in the different counties through which the same may pass and cause the same to be recorded in the office for recording deeds in the county in which said parts of said roads shall lie, and also where any relocation of said line or lines may have been made as heretofore authorized, then a like map or profile thereof, shall be made and filed in the manner and places aforesaid.

Sec. 16. This act, and all grants herein contained, shall be void, unless said company shall render to the Governor of this Territory, on or before the first day of January of each and every year, a statement in writing verified by the oath of the President and Treasurer of said Railroad Company, exhibiting the amount of capital actually expended by said company in the construction of said road, and the machinery therefor, and appurtenances thereunto belonging, the amount of their receipts and their expenditures during the year, and unless

said board of directors shall be organized on or before the first day of July, 1854, and unless said company shall construct and complete, at least fifty miles of the track of said main road from the point on Lake Superior designated in this act as the starting point for said road, within three years after the acceptance of this charter as provided in this act, and the whole of said main road within three years thereafter, and the whole of the track of the said main road shall be laid with a rail not less than sixty pounds per yard, and the engines and rolling stock of said road, shall be made in all respects equal to those on the best description of road in the United States, and unless said company shall construct, complete and maintain and keep in operation a line of telegraph from Dubuque to St. Paul upon the route of said road within twenty months after the formation of the first board of directors under this act.

Sec. 17. All acts or parts of acts that in any way conflict with this act or the rights and franchises hereby granted, are hereby repealed. *Provided*, said company accept this charter in manner and form as provided in section 2; *And Provided also*, that nothing herein contained shall be so construed as to repeal or in anywise vitiate any charter for the construction of any bridge across the Mississippi River; and *Provided further*, that the passage of this act shall not vitiate or render void any railroad charter heretofore granted by the Legislative Assembly of this Territory.

Sec. 18. This act shall be deemed a public act, and shall be in force from and after its passage.

Sec. 19. In case the persons incorporated by this act shall fail or neglect to accept the provisions of the same, and comply with its conditions within the time and in the manner herein prescribed, then the same may be accepted by any other company which shall be approved by the Governor, Auditor, and Treas-

urer of this Territory, who upon complying with the terms and conditions of this act, shall be vested with all the rights, powers and immunities conferred upon the corporators herein named and shall be subject to all the liabilities in the said act set forth in as full, ample and complete a manner as if their names were inserted as corporators in this act.

Chapter xx, Laws of Minnesota, 1855.

An Act Supplementary to an Act Entitled an Act to Amend the Minnesota and North Western Railroad Company.

Be it enacted by the Legislative Assembly of the Territory of Minnesota:

Section 1. The second section of the act to which this is amendatory, is hereby amended by adding to the last clause thereof the words following, to-wit:

1. Insert after "dollars" in the first line of section two, the words "in specie or six per cent United States stock."

2. Add to the first clause of section two the words "*Provided*, that said depositors shall not use, convert or negotiate the same, but at all times hold the same subject to the disposal of the Legislative Assembly of this Territory; and the said persons shall report to the Legislature at the annual meetings thereof the condition of said deposit; the said report to be made under oath, and within six days after the meeting of the Legislature."

3. Strike out of line three, section two, the words "to be deposited by them"; *Provided*, that said company shall and they are hereby required to construct and complete at least twenty-five miles of said road from and commencing at St. Paul towards Lake Superior, within three years from the passage of this act.

Sec. 2. The said company are hereby required to deposit the sum of one hundred and fifty thousand dollars with David L. Fuller, John R. Irvine, Louis Roberts, Vetal Guerin and Charles Bazil, of St. Paul, within six months from the passage of this act, to be forfeited to the Territory in case said company do

not construct at least fifty miles of said road within the time above limited; and the said David L. Fuller, John R. Irvine, Louis Roberts, Vetal Guerin and Charles Bazil are hereby required, upon the reception of said sum, to execute a bond to the Territory of Minnesota, with two or more sureties, in the penal sum of three hundred thousand dollars, conditioned for the return of said sum of one hundred and fifty thousand dollars to the said company upon the completion of said fifty miles of said road within the time limited as aforesaid, or in case the same be not thus completed, then to pay the said sum of money to the treasurer of the Territory or future State of Minnesota; such bond to be approved by one of the justices of the Supreme Court of this Territory, and to be deposited with the treasurer of the Territory for the benefit of the party or persons interested or aggrieved, who may sue and recover upon the same. In case the said David L. Fuller, John R. Irvine, Louis Roberts, Vetal Guerin and Charles Bazil all decline to receive said sum of said company and give the bond aforesaid, then said sum shall be deposited with the Treasurer of the Territory, who shall execute a bond in the like amount and with like conditions as the one above named, which shall be filed with the secretary of the Territory for the benefit of the parties interested as aforesaid.

Sec. 3. Section eight of the act incorporating said company is hereby amended by inserting in the second clause thereof between the words "it is further enacted that" and the word "any" the following words, to-wit: "When the said company shall have performed and complied with all the stipulations and requirements in this act named to be performed by said company, then."

Sec. 4. The legislature may at all times establish and regulate the rates of toll and fare for the transportation of property and persons upon said road: *Provided*, that said rates of

toll shall not be reduced below those exacted by the Illinois Central Railroad Company, with ten per cent added.

Sec. 5. In case said company do not accept of this act and the act to which this is a supplement within six months from the passage hereof, then all the lands before mentioned, together with the property and franchises of said company, shall be forfeited to the Territory.

Chapter lii, Laws of Minnesota, 1855.

A Bill Supplementary to an Act Entitled an Act to Amend the Minnesota and North Western R. R. Company.

Be it enacted by the Legislative Assembly of Minnesota Territory:

Section 1. The second section of the act to which this is amendatory is hereby amended by adding to the last clause thereof, the words following, to-wit:

Provided, that said company shall and they are hereby required, to construct and complete at least twenty-five miles of said road, from and commencing at St. Paul towards Lake Superior, within three years from the passage of this act.

Sec. 2. The said company are hereby required to deposit the sum of one hundred and fifty thousand dollars "in specie or six per cent United States stocks" with David L. Fuller, John R. Irvine, Louis Roberts, Vetal Guerin and Charles Bazil, of St. Paul, within six months from the passage of this act, to be forfeited to the Territory, in case said company do not construct at least fifty miles of said road within the time above limited; "*Provided*, that said depositors shall not use, convert or negotiate the same, but at all times hold the subject at the disposal of the Legislative Assembly of this Territory, and the said persons shall report to the Legislature at the annual meeting thereof, the condition of said deposit. The said report to be made under oath, and within six days after the meeting of the Legislature."

And the said David L. Fuller, John R. Irvine, Louis Roberts, Vetal Guerin and Charles

Bazil are hereby required, upon the reception of said sum, to execute a bond to the Territory of Minnesota, with two or more sureties, in the penal sum of three hundred thousand dollars, conditioned for the return of said sum of one hundred and fifty thousand dollars to the said company upon the completion of said fifty miles of said road within the time limited as aforesaid or in case the same be not thus completed then to pay the said sum of money to the Treasurer of the Territory or future State of Minnesota; such bond to be approved by one of the Justices of the Supreme Court of this Territory, and to be deposited with the treasurer of the Territory, for the benefit of the party or persons interested or aggrieved who may sue and recover upon the same.

In case the said David L. Fuller, John R. Irvine, Louis Roberts, Vetal Guerin and Charles Bazil, all decline to receive said sum of said company and give the bond aforesaid, then said sum shall be deposited with the Treasurer of the Territory, who shall execute a bond in the like amount and with like conditions as the one above named, which shall be filed with the Secretary of the Territory for the benefit of the parties interested as aforesaid.

Sec. 3. Section eight of the act incorporating said company is hereby amended by inserting in the second clause thereof between the words "it is further enacted that" and the word "any" the following words, to-wit:

"When the said company shall have performed and complied with all the stipulations and requirements in this act named to be performed by said company, then."

Sec. 4. The legislature may at all times establish and regulate the rates of toll and fare for the transportation of property and persons upon said road; *Provided*, that the said rates of toll shall not be reduced below those exacted by the Illinois Central Railroad Company, with ten per cent added.

Sec. 5. In case said company do not accept of this act and the act to which this is a supplement within six months from the passage hereof, then all the lands before mentioned, together with the property and franchises of said company shall be forfeited to the Territory.

Chapter lviii, Laws of Minnesota, 1855.

A Bill to Amend an Act Entitled "An Act to Incorporate the Minnesota and North Western Railroad Company.

Be it enacted by the Legislative Assembly of the Territory of Minnesota:

Section 1. That the eighth section of the act entitled "an act to incorporate the Minnesota and North Western Railroad Company," be, and the same is, hereby amended, by striking out so much of the said section as follows the words "*Provided also*" and inserting in the place thereof, the words following, that is to say, that whenever and so soon as the net earnings of the said road received by the said company, shall have exceeded twenty per cent or one-fifth of the amount of the Capitol actually expended by the said company in payments for lands and rights of way, and in constructing and furnishing the said road and appurtenances, the said company shall, forever thereafter, pay semi-annually to the treasurer of the Territory, or future State of Minnesota seven per cent of the net earnings of the said roilroad which shall have accrued and been received by the said company within the six months next preceding the times of the said respective payments, the first of said payments to be made at the expiration of six months from and after the said twenty per cent in net earnings shall have been received by the said company. And for the purpose of ascertaining the proceeds, receipts and income of the said road, an accurate account shall be kept by the said company, which account shall, every six months, and at the time of the making of the said payments to the Treasurer, be furnished

to the Governor of the said Territory or State by the said company, duly verified by the affidavits of its President and Treasurer.

Sec. 2. The Governor of said Territory or State, or any other person duly appointed by law, shall have power to examine the books and papers of the said corporations, and to examine, under oath, the officers, agents and employes of the said company, and other persons, for the purpose of testing the accuracy of the said account so as aforesaid to be furnished by the said company, and if any person so examined by the Governor, or other authority, shall knowingly or wilfully swear falsely, or if the officers making such affidavits, or the verifications mentioned in the second section of this Act, shall knowingly and wilfully swear falsely, every such person shall be subject to the pains and penalties of perjury. The lands granted to the said company by the act to which this is amendatory, shall be exempt from taxation under the Laws of the Territory and future State of Minnesota, until patents shall have been duly issued therefor upon the completion of each twenty miles of the said road as contemplated in and by the act of Congress entitled an act to aid the Territory of Minnesota in the construction of a railroad therein, approved June 29th, 1854.

Sec. 3. The sixteenth section of the act to incorporate the Minnesota and North Western Railroad Company is hereby repealed. The said company shall render to the Governor of the Territory or State of Minnesota on or before the first day of January in each and every year, a statement in writing verified by the oath of the President and Treasurer of the said Railroad Company, exhibiting the amount of capital actually expended by the said company in the construction of the said road and the machinery therefor, and appurtenances thereunto belonging, with the amount of their receipts and expenditures during the year. The said company shall construct and complete at

least fifty miles of the track of the said railroad between the point where it crosses the Mississippi River and the northern terminus of the said road, within three years from the passage of this act, and the whole of the remainder of the said railroad from the said northern terminus to the line of the State of Iowa shall be constructed and wholly completed by the said company within six years from and after the passage of this act. The whole of the track of the said railroad shall be laid with a rail not less than sixty pounds per yard, and the engines and rolling stock thereof shall be made in all respects equal to those on the best description of roads in the United States. Within twenty-two months from and after the passage of this act, or in case the route of the said railroad between St. Paul and the Iowa line shall be sooner located and the timber cut off, then within thirty days after such timber shall have been cut off, the said company shall construct, complete and keep in operation a line of telegraph from Dubuque to St. Paul and St. Anthony. The route or line of said road shall pass to a point not exceeding one and one-fourth of a mile from that portion of the Lake St. Croix adjoining the eastern limits of the City of Stillwater in said Territory, and also to and through the town of St. Anthony Falls, anything contained in the act to which this is amendatory to the contrary notwithstanding.

Sec. 4. In case the said company shall fail to construct and complete the said fifty miles of railroad between the northern terminus thereof and the point where the said road crosses the Mississippi River within three years from the passage of this act, or to construct and complete the whole of the remainder of the said railroad within three years hereafter, or to construct and put in operation the said line of Telegraph, within the time limited by this act, then, and in either of the said cases, this

act, and the said act to which this is amendatory, and all grants contained in the said acts, or either of them, shall cease and be void and all the lands granted to the said company and then belonging to it, together with all its chartered rights and privileges, shall revert to the Terrtory of Minnesota.

Sec. 5. All contracts, obligations, bonds, certificates and agreements which shall be entered into or executed in the name and behalf of the said Company, by its proper officers or agents, or any of them, within the scope of the general or special powers conferred by the directors upon such officers or agents, shall be obligatory upon the said company, although, except in case of Bonds and Contracts in relation to Real Estate, such instruments may not be verified by the common seal of the said Company nor specially authorized by such directors..

Sec. 6. In case the said company, its officers, agents and servants, or any or either of them, refuse to do or perform any duty required by this act, or the said act of incorporation as hereby amended, the said company, its said officers, agents and servants may, upon information filed by the Atty. General of the said Territory or State of Minnesota, or by any other officer designated by law for that purpose, be compelled by mandamus or by the decree or judgment of any court having competent jurisdiction to do and perform such duty, and may also be required and compelled to respond to such damages as the said Territory or State shall be found to have sustained in consequence of such failure or omission.

Sec. 7. The act entitled "an act to incorporate the Minnesota and North Western Railroad Company" is hereby re-enacted, subject to the amendments and provisions herein contained.

Sec. 8. This act shall be deemed a public act and shall be in force from and after its passage.

Sec. 9. Legislature of the Territory or future State of Minnesota may repeal, amend or modify this act and the act to which this is amendatory from and after the expiration of twenty years from the date of the passage of this act. *Provided*, that compensation be made to said Company for all damages sustained thereby.

Chapter xlvii, Laws of Minnesota, 1856.

An Act Granting an Extension of Time to the Minnesota and North Western Railroad Company, and for Other Purposes.

Be it enacted by the Legislative Assembly of the Territory of Minnesota:

Section 1. That the respective periods within which the Minnesota and North Western Railroad Company are now required by law to construct and complete portions of said road contemplated in and by the Charter of said Company, and to construct and put in operation the telegraph therein mentioned, shall be and the same hereby are severally extended as follows, that is to say: The said telegraph shall be completed and put in complete operation on or before the 17th day of November, 1858, or in case the said railroad from St. Paul to the Iowa line shall be located and the timber be cut out of the line of said road, before that day, then in that case the said telegraph shall be constructed and put in operation within sixty days after such timber shall have been cut out. Fifty miles of said road running from St. Paul northwordly shall be fully completed on or before the 17th day of February, 1860, and the remainder of the said road shall be fully completed and put in operation on or before the 17th day of February, 1863.

Provided, however, that it shall be the duty of said company to locate and construct the said road in conformity with the act of Congress entitled "An act to aid the Territory of Minnesota in the construction of a railroad therein," approved on the 29th day of June, 1854, and, provided, also, that this extension

of time to the said Minnesota and Northwestern Railroad Company, and all their rights, franchises and privileges under their Charter shall be null and void, and the Governor of said Territory shall by proclamation to be published in some newspaper in St. Paul, and in the city of New York so declare as notice to all concerned, upon the failure of said Company to comply with the following condition, which is, that said Minnesota and North Western Railroad Company shall, on or before the fourth day of July, 1856, notify the Governor of this Territory in writing, to be signed by the President and Secretary, or the acting President and acting Secretary of said Company, that they have and do accept fully the provisions of this act as a part of their original Charter, as approved by the Governor of this Territory on the fourth day of March, 1854, and with a certificate that the said acceptance is in obedience to directions previously given by the Board of Directors.

Sec. 2. In consideration of the grant of lands contemplated in the 8th section of the Charter to said company, approved March 4th, 1854, and of the extension of time to said company as herein stated, and in further consideration of the restoration of all rights, powers and franchises to said company which may be supposed to have from any cause become forfeited to the Territory of Minnesota, said corporation binds and obliges itself to pay or cause to be paid to the Territory or future State of Minnesota, two per cent. upon each dollar of the gross receipts, proceeds and income of said Railroad so far as the same may be received or due them on that part of said road lying within the limits of the Territory or future State of Minnesota, to be paid to the Treasurer of said Territory or future state annually, on the first day of January in each year, from and after the day when the cars shall commence running on any part of said road in said Territory or future State of Minnesota, and which

proceeds shall be appropriated to the payment of the Territorial or State government expenses, and such payment shall be in lieu of, and the said company shall be exempt from the payment of any other imposts, taxes or dividends, any law to the contrary notwithstanding.

Sec. 3. And for the purpose of ascertaining the proceeds, receipts or income aforesaid, an accurate account shall be kept by said company, a copy whereof shall be furnished to the Governor of the Territory or future State of Minnesota; the truth of which account shall be verified by the affidavits of the President and Treasurer of said Company. And for the purpose of verifying and ascertaining the accuracy of such account, full power is hereby vested in the Governor of the Territory or future State of Minnesota, or any other person by law appointed, to examine the books and papers of said corporation, and to examine, under oath, the officers, agents and employes of said company, and other persons, and if any person so examined by the Governor, or other authority, shall knowingly and willingly, swear falsely, or if the officers making such affidavits, shall knowingly and wilfully, swear falsely, every such person shall be subject to the pains and penalties of perjury. The Territory or future State of Minnesota shall have a prior lien upon said road and branches, and all the appurtenances and stock thereof, for all penalties, taxes and dues which may accrue to the Territory or future State from said corporation, as herein provided; which lien of the Territory or future State shall take precedence of all demands, judgments or decrees against said corporation.

Sec. 4. Said company shall construct and put in operation a branch thereof to a point within one and a quarter miles of the eastern limits of the city of Stillwater. *Provided*, it is consistent with the act of Congress, approved 29th June, 1854, granting land to aid said Territory in the construction of a road therein.

Sec. 5. This act shall be in force from and after its passage.

Chapter ccxxiv, Laws of Minnesota, 1858.

An Act to Relieve the Minnesota and Northwestern Railroad Company.

Be it enacted by the Legislature of the State of Minnesota:

Section 1. That the Minnesota and Northwestern Railroad Company shall be and hereby is exempted and released from all obligation to construct a Railroad and Telegraph to the southward of some point between Anoka and St. Paul. *Provided*, they shall build and put in operation that portion of the railroad mentioned and contemplated in and by its charter, and extend the same from the St. Louis Bay at the head of Lake Superior within the limits of this State, to some point between Anoka and St. Paul; *Provided, further*, however, that the said Minnesota and Northwestern Railroad Company shall, within sixty days from and after the passage of this Act, duly execute under its corporate seal and deliver to the Minnesota and Pacific Railroad Company, the Transit Railroad Company, the Root River Valley and Southern Minnesota Railroad Company, and the Minneapolis and Cedar Valley Railroad Company, respectively, a full, ample and sufficient covenant, undertaking and agreement, whereby the said the Minnesota and Northwestern Railroad Company, shall covenant, promise and agree, as well for their grantees and assigns, as for themselves and their successors, that neither the said covenanters, nor their successors, grantees or assigns, shall, at any time, claim or attempt to enforce as against the said, the Minnesota and Pacific Railroad Company, the Transit Railroad Company, the Root River Valley and Southern Minnesota Railroad Company, and the Minneapolis and

Cedar Valley Railroad Company, or either of them, or against any person or persons claiming under or through them, or either of them, any title to or interest in any of the lands which have been granted to the said last mentioned companies, respectively; and *Provided, further*, that the said the Minnesota and Northwestern Railroad Company shall also, within the said sixty days aforesaid, execute under the corporate seal of said company, duly signed by the proper officers thereof, and deliver to the Governor, a full, absolute and unconditional release of all the right, title, interest and claim said company now have, or may hereafter acquire in and to any part or portion of the five million loan to railroads, provided for by an amendment to the Constitution of this State, and shall within the time aforesaid execute and deliver to the Governor of this State, a good and sufficient undertaking, covenant and agreement, whereby the said company shall undertake, promise and agree, that they will not, under penalty of a forfeiture of their chartered rights and privileges at any time claim or attempt to obtain any portion of the five million loan to railroads provided for by an amendment to the constitution of this state, approved by the people of Minnesota April 15, 1858.

Sec. 2. In case the covenants, undertakings and agreements, above mentioned, shall not be duly executed and delivered by the Minnesota and Northwestern Railroad Company, in full compliance with the above provisions, within the time therein limited, this Act shall cease and thenceforth become and be inoperative and void.

Sec. 3. It shall and may be lawful for the Minnesota and Northwestern Railroad Company to consolidate with the Minnesota and Pacific Railroad Company upon such terms as may be agreed upon by the Board of Directors of said companies respectively.

Sec. 4. This act shall take effect from and after its passage.

Chapter cii, Laws of Minnesota, 1872.

An Act to Amend the Charter of the Minnesota and Northwestern Railroad Company.

Be it enacted by the Legislature of the State of Minnesota:

Section 1. The name of the Minnesota and Northwestern Railroad Company, created, organized and existing by and under the act entitled "An act to incorporate the Minnesota and Northwestern Railroad Company," approved March fourth (4th) one thousand eight hundred and fifty-four (1854), and acts amendatory thereof, may be changed by resolution of the board of directors to the name of the Saint Paul and Iowa Railroad Company, or such other name as said board of directors shall select, a copy of which resolution shall be filed in the office of the secretary of state, and thereafter the company shall be known by the name so selected and adopted.

Sec. 2. This act shall take effect and be in force from and after its passage.

Chapter 83, Laws of Minnesota, 1883.

An Act to Amend the Charter of the Minnesota and Northwestern Railroad Company.

Be it enacted by the Legislature of the State of Minnesota:

Section 1. That the Minnesota and Northwestern Railroad Company, created, organized and existing by and under an act of the Legislature of the Territory of Minnesota entitled "An act to incorporate the Minnesota and Northwestern Railroad Company," approved March fourth (4th) one thousand eight hundred and fifty-four (1854), and acts amendatory thereto, is hereby authorized to consolidate its stock, franchises, rights and property with that of any other railroad company which will undertake the construction and operation of the railroad which the said Minnesota and Northwestern Railroad Company is authorized to construct and operate.

Sec. 2. The seventh section of said original act incorporating the Minnesota and Northwestern Railroad Company is hereby amended to read as follows:

Section 7. The said corporation is hereby authorized and empowered to survey, locate, construct, complete, alter, maintain and operate as a railroad, with one (1) or more tracks or lines of rails, with all necessary bridges, from such a point on the northern boundary of the State of Iowa as the board of directors of said corporation shall designate, northerly, by way of the cities of St. Paul and Minneapolis, to the northern boundary of this State.

Sec. 3. This act shall take effect and be in force from and after its passage.

STATUTES OF MINNESOTA CONFERRING THE RIGHT UPON RAILROAD CORPORATIONS, DOMESTIC OR FOREIGN, TO PURCHASE OTHER RAILROADS:

Section 2714 of Statutes of Minnesota, 1894, is as follows:

> "§ 2714. WHEN ONE COMPANY CAN LEASE OR CONTROL ANOTHER.
>
> Any railroad corporation, either domestic or foreign, whether organized under a general law or by virtue of a special charter, may lease or purchase, or in any way become owner of or control, or hold the stock of, any other railroad corporation, when their respective railroads can be lawfully connected and operated together so as to constitute one continuous main line, with or without branches.
>
> (1881, c. 94, § 1; G. S. 1878, v. 2, c. 34, § 68a)."

Section 2751 of Statutes of Minnesota, 1894, is as follows:

> § 2751. IOWA COMPANIES—EXTENSION INTO MINNESOTA—CONDITIONS.
>
> Any railroad organized, or that may be hereafter organized under the laws of the state of Iowa, is hereby authorized to extend and build its road into the state of Minnesota; and such railroad company shall have and possess all the powers, franchises and privileges, and be subject to the same liabilities, of railroad companies organized and incorporated under the general laws of this state; provided, such non-resident company shall first file a true copy of its articles of incorporation with the secretary of this state, and shall comply with the laws of Minnesota as to filing and record-

ing its articles of incorporation, and shall keep an office in this state, in the same county in which its railroad is or is proposed to be built, and shall be liable to civil process, to be sued and to sue, as provided by law. Service of any civil process on the local station agent in this state shall be deemed and construed to be a personal service of such process on any such company doing business in this state under the provisions of this act; provided, that no company shall be entitled to operate under the provisions of this act, until such company has filed in the office of the secretary of state of this state an acceptance of the provisions of this act.

(1873, c. 27, § 1, as amended 1877, c. 14, § 1; G. S. 1878, c. 34, § 106)."

Section 2753 of Statutes of Minnesota, 1894, is as follows:

"§ 2753. FOREIGN COMPANIES—EXTENSION INTO MINNESOTA—CONDITIONS.

That any railroad company organized under the laws of other states is hereby authorized, upon being incorporated in this state as hereinafter provided, to build and extend its road into, through, or across the State of Minnesota, and such railroad company shall have and possess all the powers, franchises, immunities and privileges, and be subject to the same liabilities as railroad companies organized and incorporated under the general laws of this state. Provided, and this act is upon the express condition which is accepted by any company that avails itself of the provisions of this act, and which is in accord with the uniform practice of all railroad companies heretofore reporting 'gross earnings' for taxation under the laws of this state, that the term 'gross earnings' as used in sections one and two of chapter one hundred and eleven of the general laws of one thousand eight hundred

and seventy-three, and in section one of chapter eleven of the general laws of one thousand eight hundred and eighty-seven, shall be construed to mean 'all earnings on business beginning and ending within the state and a proportion based upon the proportion of the mileage within the state to the entire mileage over which such business is done, of earnings on all inter-state business passing through, into or out of the state, and shall include gross earnings of all express companies, fast freight lines, sleeping and parlor car companies, and other common carriers, corporations or persons doing business or transporting persons or property on and over the lines or right of way of any railroad company within this state by virtue of an agreement, contract or arrangement of any nature with such railroad company. Provided, such railroad company shall first file in the office of the secretary of state of the State of Minnesota, a true copy of its articles of organization, or incorporation, duly certified as such by the secretary of state of the state of its original incorporation, and shall comply with the laws of the state of Minnesota as to filing and recording its said articles of organization or incorporation by causing a certified copy thereof to to recorded in the office of said secretary of state of the State of Minnesota, and a like certified copy of said articles to be recorded in the office of the register of deeds of the county where the principal place of business of said railroad company is to be located in this state, and shall keep an office in this state in the same county, or some one of the counties, in or through which its railroad is, or is proposed to be built, and shall be liable to civil process, to be sued and to sue as provided by law.

(1889, c. 235, § 1.)"

Supreme Court of the United States.

OCTOBER TERM, 1909.

NO. 377.

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CHICAGO GREAT WESTERN RAILWAY CO.,
Plaintiff in Error,

vs.

THE STATE OF MINNESOTA,
Defendant in Error.

On Writ of Error to the Supreme Court of Minnesota.

ARGUMENT FOR DEFENDANT IN ERROR.

GEORGE T. SIMPSON,
Attorney General.

GEORGE W. PETERSON,
Assistant Attorney General,
Attorneys for Defendant in Error.

Supreme Court of the United States.

OCTOBER TERM, 1909.

NO. 377.

CHICAGO GREAT WESTERN RAILWAY CO.,
Plaintiff in Error,

vs.

THE STATE OF MINNESOTA,
Defendant in Error.

STATEMENT OF THE CASE.

This action was originally commenced in the District Court of Ramsey County, Minnesota, to recover a balance of $24,979.62 claimed to be due from the plaintiff in error on account of the four per cent. tax on its gross earnings for the year 1905. The defense to the action was the alleged unconstitutionality (as applied to the railroad of the plaintiff in error) of the four per cent. gross earnings tax law, Chapter 253, G. L. 1903, which law the plaintiff in error claimed to have impaired the obligation of a two per cent. gross earnings tax provision contained in the Territorial Charter of

the Minnesota and Northwestern Railroad Company. The plaintiff in error contended that this provision was an irrepealable contract, the benefit of which had been transferred to it, so as to prevent the state from increasing the rate of taxation upon its line of railway. This contention of the plaintiff in error was sustained in the District Court of Ramsey County, and judgment was ordered for the plantiff in error.

From the judgment of the District Court of Ramsey County the State of Minnesota appealed to the Supreme Court of Minnesota, and urged in said Court the following assignments of error:

ASSIGNMENTS OF ERROR.

The District Cout erred:

First.

In holding as a conclusion of law that the act of March 1, 1856, constituted a valid contract between the Territory of Minnesota and the Minnesota and Northwestern Railroad Company, fixing the rate of taxation to be paid by said company and that said contract rights were never forfeited or lost by that company.

Second.

In holding as a conclusion of law that the alleged contract right was transferred to the Chicago, St. Paul and Kansas City Railway Company and from that company to the defendant.

Third.

In ordering and entering judgment that Chapter XLVII of the Laws of 1856, being the charter of the Minnesota and North Western Railroad Company, constituted a valid contract, the rights to and under which were never forfeited or lost by the Minnesota and North Western Railroad Company, but were transferred to the Chicago, St. Paul and Kansas City Railway Company and finally transferred to the defendant and that the lawful rate of taxation which the State of Minnesota may exact from the defendant is the sum of two per cent. upon each dollar of the gross receipts, proceeds and income of said defendant railway company, so far as the same may be received by or due said company on that part of said road lying within the limits of the State of Minnesota, and that such payment shall be in lieu of, and the company shall be exempt from the payment of any other imposts, taxes, or duties, any law to the contrary notwithstanding.

Fourth.

In ordering and entering judgment that the plaintiff take nothing by this action and that the same be dismissed.

Fifth.

In not concluding as a matter of law that the State was entitled to, and in not ordering and entering judgment against the defendant for the sum of $24,979.62, with the statutory penalty thereon.

The Supreme Court of Minnesota, on December 24, 1908, held:

> "State v. Great Northern Ry. Co., *infra*, page 303, sustaining the validity of Chapter 253, Laws 1903, increasing the gross earnings tax of railroad companies of the state to four per cent., followed and applied." (Trans. p. 203; 106 Minn. 290.)

The facts more in detail are as follows:

The Minnesota and North Western Railroad Company was chartered by special act of the Territorial Assembly approved March 4, 1854, the same being Chapter XLVII, Laws of 1854. This act was forthwith formally accepted by the incorporators, but nothing was done in the way of building a railway, not a dollar was expended in actual work, for nearly thirty years. In 1884-5, the company having been taken over by new interests, it built the road from St. Paul southward to and beyond the state line. (Trans. p. 75.)

By an act approved February 17, 1855 (Chapter LVIII, Laws of 1855), the territorial charter was amended in certain respects. This act also contained the following provision:

> "The legislature * * * may repeal, amend or modify this act and the act to which this is amendatory from and after the expiration of twenty years from the date of the passage of this act. Provided that compensation be made to said company for all damages sustained thereby."

In 1856 the Minnesota and North Western charter was amended by Chapter XLVII, Laws of 1856. Sections 2 and 3 of that act provided for a

2 per cent. gross earnings tax in lieu of all other taxes. These are the provisions which are now claimed to be an irrepealable contract making it impossible for the State to increase the rate of the tax.

Minnesota became a State in 1858, adopting a Constitution requiring all taxes to be "as nearly equal as may be," and that all taxable property should have a cash valuation equal and uniform throughout the State. It was required also that all property in the State should be taxed, save only certain enumerated exceptions, which did not include railroad property. See Sections 1 and 3, Article 9 of the Constitution of Minnesota.

The effect of these provisions was to render the State legislature incompetent to enact a gross earnings tax law. In 1871, however, the Constitution was amended by the addition of Section 32a of Article 4. The effect of this was to validate all previously enacted railroad gross earnings tax laws. This ratification or validation was accompanied by the reservation of the right to amend or repeal any of such laws, the amending or repealing act requiring submission to and approval by popular vote.

Twelve years after this amendment, by Chapter 83, Special Laws 1883, the Minnesota and North Western Railroad Company was authorized "to consolidate its stock, franchises, rights and property with that of any other railroad company which will undertake the construction and operation of the railroad which the said Minnesota and North West-

ern Railroad Company is authorized to construct and operate."

At this time nothing had been done towards building or operating a railroad. Construction work was commenced in 1884 (Trans. p. 75) and completed about October 1, 1885. From this time until December 8, 1887, the line was operated by the Minnesota and North Western Railroad Company.

On December 8, 1887, by an absolute deed of conveyance (Exhibit B of the answer, Trans. p. 23) the Minnesota and North Western Railroad Company sold and conveyed all of its property to the Chicago, St. Paul and Kansas City Railway Company, an Iowa corporation which operated the road till June 30, 1892. This deed recites that it was made "by and between the Minnesota and North Western Railroad Company, a corporation duly formed and organized under and by virtue of the laws of Minnesota, party of the first part, and the Chicago, St. Paul and Kansas City Railway Company, a corporation duly formed and organized under and by virtue of the laws of the State of Iowa." After this conveyance, and by reason thereof the Minnesota and North Western Company became defunct and no further mention is made thereof in the record.

On June 30, 1892, the road and the appurtenant property was leased to the Chicago Great Western Railway Company, an Illinois corporation (Trans. p. 47), for the term of ninety-nine years (Trans. p. 27). The Chicago, St. Paul and Kansas City

Railway, having become involved financially, caused the appointment of the "Committee on Scheme of Reorganization," which made its report under date of October 3, 1892. For a copy of this report see Trans. p. 32 *et seq.* The plan adopted by the committee is set forth in detail with this preface (Trans. p. 34): "For the purpose of facilitating a simple and inexpensive reorganization, the Chicago Great Western Railway Company has been organized under the laws of the State of Illinois and a lease * * * has been made to the above corporation, which is now operating the line."

The lease was operative only until September 7, 1893, on which date, by an absolute deed (Trans. p. 40) the Chicago, St. Paul and Kansas City Railway Company conveyed all of its property to the Chicago Great Western Railway Company, the plaintiff in error, which has ever since owned and operated the road. The effect of the transaction evidenced by this deed seems to have been to wipe out the Chicago, St. Paul and Kansas City Railway Company for no further mention is made of it. From these transactions it is apparent that the Chicago, St. Paul and Kansas City Railway Company was an entirely different corporation from the Minnesota and North Western Railroad Company, and that the plaintiff in error, Chicago Great Western Railway Company, is also a new corporation entirely different from either of its predecessors.

The question for decision is not only as to the existence of the irrepealable contract relative to taxation in favor of the Minnesota and North Western

Company, but also as to the continuance of that contract in favor of the two companies which have succeeded to the ownership of the road.

The gross earnings of the road in 1905, in Minnesota, were $1,248,980.24. Plaintiff in error, acknowledging liability for a two per cent. tax, has paid $24,979.62. This leaves a like amount due under the four per cent. gross earnings tax law, if the same is constitutional as applied to the lines of the plaintiff in error.

Sections 2 and 3 of the Minnesota and North Western Charter read as follows:

> "Sec. 2. In consideration of the grant of lands contemplated in the 8th section of the charter to said company, approved March 4th, 1854, and of the extension of time to said company as herein stated, and in further consideration of the restoration of all rights, powers and franchises to said company which may be supposed to have for any cause become forfeited to the Territory of Minnesota, said corporation binds and obliges itself to pay or cause to be paid to the Territory or future State of Minnesota two per cent. upon each dollar of the gross receipts, proceeds and income of said railroad, so far as the same may be received or due them on that part of said road lying within the limits of the Territory or future State of Minnesota, to be paid to the treasurer of said Territory or future State annually, on the first day of January in each year, from and after the day when the cars shall commence running on any part of said road in said Territory or future State of Minnesota, and which proceeds shall be appropriated to the payment of the Territorial or State government expenses, and such payments shall be in lieu of, and the said company shall be exempt from the payment of

any other imposts, taxes or dividends, any law to the contrary notwithstanding.

Sec. 3. And, for the purpose of ascertaining the proceeds, receipts or income aforesaid, an accurate account shall be kept by said company, a copy whereof shall be furnished to the governor of the Territory or future State of Minnesota; the truth of which account shall be verified by the affidavits of the president and treasurer of said company. And for the purpose of verifying and ascertaining the accuracy of such account, full power is hereby vested in the governor of the Territory or future State of Minnesota, or any other person by law appointed to examine the books and papers of said corporation, and to examine, under oath, the officers, agents and employees of said company, and other persons, and if any person so examined by the governor, or other authority, shall knowingly and willingly swear falsely, or if the officers making such affidavits shall knowingly and wilfully swear falsely, every such person shall be subject to the pains and penalties of perjury. The Territory or future State of Minnesota shall have a prior lien upon said road and branches, and all the appurtenances and stock thereof, for all penalties, taxes and dues which may accrue to the Territory or future State from said corporation, as herein provided; which lien of the Territory or future State shall take precedence of all demands, judgments or decrees against said corporation." (Trans. p. 13, 14.)

Chapter 253, G. L. 1903, reads as follows:

"An act providing for the taxation of railroad properties, the collection of such taxes and repealing acts inconsistent therewith.

Be it enacted by the legislature of the State of Minnesota:

Section 1. Every railroad company owning or operating any line of railway situated within, or partly within this state, shall during the

year 1905, and annually thereafter, pay into the treasury of this State, in lieu of all taxes and assessments upon all property within this State owned or operated for railway purposes by such company, including equipment, appurtenances, appendages and franchises thereof, a sum of money equal to four (4) per cent. of the gross earnings derived from the operation of such line of railway within this state, and the annual payment of such sum shall be in full and in lieu of all other taxes and assessments upon the property and franchises so taxed. The lands acquired by public grant shall be and remain exempt from taxation until sold or contracted to be sold, or conveyed, as provided in the respective acts whereby such grants were made or recognized.

Section 2. The term 'the gross earnings derived from the operation of such line of railway within this state,' as used in Section 1 of this act is hereby declared and shall be construed to mean all earnings on business beginning and ending within the State, and a proportion, based upon the proportion of the mileage within the State to the entire mileage over which such business is done, of earnings on all interstate business passing through, into or out of the State."

This act became operative covering taxes for the year 1905. The plaintiff in error claims an irrepealable contract in the taxing provisions above set forth, and that Chapter 253, Laws 1903, *supra*, has impaired said contract, in violation of the Federal Constitution. The effect of Chapter 253, *supra*, was to place the plaintiff in error on the same basis concerning taxation as all other railroads in the State.

In the instant case there was no land grant, as in the Great Northern case, submitted herewith.

The land grant was never earned, but was forfeited, pursuant to the terms of the charter.

The Railroad and Warehouse Commission, prior to the passage of Chap. 253, *supra*, the four per cent. gross earnings law. duly certified a two per cent. tax as to the plaintiff in error, pursuant to the charter, but not as an irrepealable contract (Trans. fol. 97-107).

ARGUMENT.

I.

UNTIL 1871, ALL LAWS OF THE STATE OF MINNESOTA, PROVIDING FOR THE TAXATION OF RAILROAD PROPERTY ON THE GROSS EARNINGS BASIS, WERE UNCONSTITUTIONAL. BY THE CONSTITUTIONAL AMENDMENT OF 1871 (ARTICLE 4, SEC. 32a) ALL SUCH LAWS WERE VALIDATED SUBJECT TO THE RESERVED RIGHT OF AMENDMENT OR REPEAL.

This result is due to the provisions of Sections 1 and 3 of Article 9 of the State Constitution. They read as follows:

> "Section 1. All taxes raised in this state shall be as nearly equal as may be and all property on which taxes are to be levied shall have a cash valuation and be equalized and uniform throughout the state.
>
> Section 3. Laws shall be passed taxing all moneys, credits, investments in bonds, stocks, joint stock companies or otherwise and also all real and personal property according to its true value in money."

The purpose of these sections was thus declared in County v. Citizens' National Bank, 23 Minn. 280 (287):

> "The leading and controlling purpose of these provisions was to subject all property of every kind and nature, within the jurisdiction of the state, except such as is specially authorized to be exempted, to taxation, upon a basis of a cash valuation, and to secure so far as practicable absolute equality and uniformity in the proportionment of taxes, so that every piece of property should bear its just and appropriate share of the public burden in the exact ratio of its cash value to that of the entire property of the state."

A tonnage tax upon the product of mines is certainly no more objectionable to these sections than is the railroad gross earnings tax and yet the tonnage tax was swept aside by the Supreme Court, Mr. Justice Mitchell writing, in these words:

> "It would be difficult to conceive of a system of taxation more obnoxious to the Constitution."
>
> State v. Lakeside Land Co., 71 Minn. 283 (286).

Both the original invalidity of all such laws and their ratification by the Constitutional Amendment of 1871, with the reservation of the right to amend or repeal, is fully established by

State v. Luther, 56 Minn. 156;

State ex rel. Marr v. Stearns, 72 Minn. 200;

State v. Duluth & Iron R. R. Co., 77 Minn. 433.

In the Stearns case it was said, on page 224:

> "That the statutes * * * were unconstitutional when enacted, and remained so until validated by the constitutional amendment of 1871. The legal effect of such amendment was to validate them. * * * But this ratification or validation of the statutes was a qualified one and the right to repeal or amend them was reserved by necessary implication, provided such repeal or amendment was adopted or ratified by a majority of the electors."

The foregoing argument does not reach beyond the obvious, and is preliminary only. The proposition thus stated and established is the foundation of the State's case. In order to avoid the effect of the Constitutional Amendment as a reservation of the right to repeal or amend, the plaintiff in error must show that (1) the two per cent. gross earnings tax provision of the Minnesota & North Western charter was and remains as irrepealable contract, and that, (2) notwithstanding the constitutional provisions the exemption has been conferred upon and is now owned by the plaintiff in error, an Illinois corporation organized and admitted to do business in this state in 1892.

II.

BY REASON OF THE FAILURE TO BUILD THE ROAD, OR ANY PART OF IT UNTIL 1884-5, THE CHARTER OF THE MINNESOTA & NORTHWESTERN CO. WAS FORFEITED AND NOT EARNED AND DID NOT BECOME A CONTRACT UNTIL THAT YEAR, AND IN SO FAR AS IT THEN TOOK ON A CONTRACTUAL CHARACTER, IT WAS SUBJECT TO THE CONSTITUTION AS AMENDED IN 1871. THE TWO PER CENT GROSS EARNINGS TAX PROVISION THEREFORE WAS SUBJECT TO AMENDMENT OR REPEAL.

Attention is here called to Section 4 of Chapter LVIII, Laws 1855, adopted Feb. 17, 1855, entitled, "A bill to amend an act entitled, 'An act to incorporate the Minnesota & Northwestern Railroad Company,'" which section reads as follows:

> "Section 4. In case the said company shall fail to construct and complete the said fifty miles of railroad between the northern terminus thereof and the point where said road crosses the Mississippi river within three years from the passage of this act, or to construct and complete the whole of the remainder of said railroad within three years hereafter, or to construct and put in operation the said line of telegraph within the time limited by this act, then, in either of said cases, this act, and the said act to which this is amendatory, and all grants contained in said acts, or either of them, *shall cease and be void*, and *all the lands granted* to the said company and then belonging to it, *together with all its chartered rights and privileges, shall revert* to the Territory of Minnesota."

Sec. 16, of Chap. 47, the original charter, is of like tenor.

Attention here is called to Section 1 of Chapter 47, Laws of 1856, entitled, "An act granting an extension of time to the Minnesota & Northwestern Railroad Company, and for other purposes."

Section 1 of said chapter extended the period of time as limited in section 4 of Chapter 58, Laws of 1855, an additional two years, as follows:

> "Section 1. That the respective periods within which the Minnesota & Northwestern Railroad Company are now required by law to construct and complete portions of said road contemplated in and by the charter of said company, and to construct and put in operation the telegraph therein mentioned, shall be and the same hereby are severally extended as follows, that is to say: the said telegraph will be completed and put into complete operation on or before the 17th day of November, 1858, or in case the said railroad from St. Paul to the Iowa line shall be located and the timber be cut out of line of the said road before that day, then and in that case the said telegraph will be constructed and put in operation within sixty days after such timber shall have been cut out. *Fifty miles of said road running from St. Paul northwardly shall be fully completed on or before the* 17*th day of February*, 1860; *and the remainder of said road shall be fully completed and put into operation on or before the* 17*th day of February*, 1863, * * *"

provided that Chapter 47, supra, was duly accepted. This acceptance was made.

It is to be noted that under section 4 of Chapter 58, supra, the road running northwardly from St. Paul for a distance of fifty miles was to be fully completed on or before February 17, 1858, and the remainder of the road was to be completed and

put into operation on or before February 17, 1861.

The effect of section 1 of chapter 47, supra, of course could not be to repeal the portion of section 4 of chapter 48, supra, that on failure to construct, the grant "shall cease and be void."

This is distinctly held in Brooklyn, etc., R. Co., 72 N. Y. 245, where the exact analogy exists.

The charter of a public service corporation is not a donation unsupported by a valuable consideration. It is a grant which must be earned by the doing, within the time limited in the grant, or if no time is limited, then within a reasonable time, of the things, to induce the doing of which, the grant is made. If the charter is not thus earned it is abandoned. And if finally, after the lapse of many years, the corporate enterprise is proceeded with, by legislative permsision, it is in all respects subject to the laws then in existence, and the constitutional limitation.

(a) THE CHARTER OF THE MINNESOTA & NORTHWESTERN COMPANY WAS IPSO FACTO FORFEITED.

Provision is made in many charters for their forfeiture upon failure of the corporation to comply with certain conditions imposed, as that it shall begin the construction of its road within a certain time, and complete the road and put it in operation before the expiration of a time limited.

Arcata v. Arcata, etc., R. Co., 92 Cal. 639, 28 Pac. 676.

Oakland R. Co. v. Oakland, etc. R. Co., 45 Cal. 365, 13 Am. R. 181.

State v. St. Paul, etc. R. Co., 35 Minn. 222, 224.

Such provisions appear in all of the general acts for the incorporation of railroads.

Stimson Am. Stat. (1892), Sec. 8528.

Under some of the statutes the forfeiture will take effect upon failure to comply with the conditions imposed, without judicial determination.

Oakland R. Co. v. Oakland, etc. R. Co., supra.

Brooklyn Steam Tr. Co. v. Brooklyn, 78 N. Y. 524.

State v. St. Paul etc. R. Co., supra.

Bywaters v. Paris, etc. R. Co., 72 Tex. 624, 11 S. W. 856.

Farnsworth v. R. Co., 92 U. S. 66.

In re Railway Co., 81 N. Y. 71.

In Oakland R. Co. v. Oakland etc. R. Co., supra, it was held that in case a franchise is granted by the legislature to construct a street railroad within a certain time, with a condition that if the provisions of the act are not complied with the franchise shall be forfeited, a failure to lay the track within the time limited, works a forfeiture of the right to lay the same without a judgment at the suit of the state declaring a forfeiture, and the legislature may confer the franchise upon any other company or person.

Said the Court:

> "In this case it is clear that the legislature intended, by the restriction as to the time within which the defendant's work was to be completed, that it should have no rights in the streets of Oakland if it failed to exercise them within five years." Idem, p. 189.

The charter in said cause provided that upon failure to comply with the provisions of the act, "the franchise and privileges herein granted shall utterly cease and be forfeited." Idem. p. 189.

Said the Court:

> "Not to give effect to this declaration would be to frustrate and defeat the legislative will." Idem. p. 189.

Said the Court in State of Minnesota v. St. Paul & Sioux City Railroad Company:

> "Two grounds of forfeiture against this corporation are alleged: *First*, the sale by it, pursuant to the provisions of Sp. Laws 1881, c. 228, of its railroad, and the consequent suspension by it of all its business as a railroad company; *second*, its failure to survey, locate, construct, complete, or operate the branch it was authorized and empowered to construct and operate from St. Anthony, *via* Minneapolis, to a point of junction at Shakopee city.
>
> The second we will consider first. By Sp. Laws 1864, c. 1, *subc.* 2, the franchises of the respondent (being part of those which passed to the state upon the foreclosure against the Root River Valley and Southern Minnesota Railroad Company; and by the forfeiture of its franchises) were vested in it. Section 5 of the act attached a condition to the grant that it should construct and equip its road and branches within eight years from March 3, 1864, and provided that upon failure so to do all unbuilt portions thereof, "with the properties, rights and franchises appertaining thereto, shall be absolutely forfeited, and shall revert to the state without any other act or ceremony whatever." Laws 1865, c. 15, sec. 4, repeats the condition and proviso, adding the words "legislative or judicial." It is clear from this that it was not the intention that a failure to construct a portion of its road or

branches should be cause of forfeiture of its corporate franchise, or of its franchise to maintain and operate the constructed portion of its road, but that the forfeiture should be restricted to the unbuilt portion, with the property rights and franchises appertaining thereto. *State v. Southern Minn. R. Co.*, 18 Minn. 21, (40). And it is also clear that it was intended that a failure should, *ipso facto*, work a forfeiture without any judicial sentence, or legislative declaration, or any act on the part of the state." Idem. pp. 223, 224.

The first headnote to Bywaters v. Paris, etc. R. Co., supra, is as follows:

"1. Rev. St. Tex. art. 4278, provides that if any railway corporation organized under that title shall not, within two years after filing and recording its articles of association, begin the construction of its road, and construct and equip, etc., at least 10 miles of its proposed road, such corporation shall 'forfeit its corporate existence, and its powers shall cease as far as it relates' to the unfinished part of the road, 'and shall be incapable of resumption by any subsequent act of incorporation.' *Held*, that the failure to begin the construction of the road within the two years works a forfeiture of corporate existence without any judicial proceedings for that purpose." Idem, p. 856.

"At common law a forfeiture did not operate to divert the title of the owner or to restore to the government a thing granted, until a judgment of forfeiture had been obtained in a suit instituted for that purpose. After such judgment, under the doctrine of relation, the title was carried back to the owner as of the time of the happening of the event or the commission of the offense upon which the estate was conditioned; but *where the statute provides that a failure to pay at a certain time or*

to complete the contemplated work within a certain time shall work a forfeiture, no action is necessary to enforce the forfeiture. In such a case, upon the happening of the event of the commission of the offense which is the statutory basis of forfeiture, the title to the thing forfeited immediately vests in the State." Cases cited.

Arcata v. Arcata etc. R. Co., 92 Cal. 639, 28 Pac. 676.

U. S. v. Grundy, 3 Cranch, 337.

Attention is here called to the case of In Re Brooklyn etc. R. Co., 75 N. Y. 335. The first headnote thereof is as follows:

"Under and by virtue of the provision of the general railroad act (Sec. 47, Chap. 140, Laws of 1850, as amended by Sec. 1, Chap. 775, Laws of 1867, which declares that if any corporation organized under it shall not, within five years after its articles of association are filed and recorded, begin the construction of its road, etc., 'its corporate existence and powers shall cease;' *a corporation failing to comply with said condition becomes by reason thereof extinct; and no action or judicial proceeding is needed to declare or complete a forfeiture of its charter and loss of corporate powers.*"

In re Brooklyn, etc., R. Co., 72 N. Y. 245; 19 Hun (N. Y.) 314; 55 How. Pr. (N. Y.) 14;

Sulphur Springs, etc. R. Co. v. St. Louis, etc. R. Co., 2 Tex. Civ. App. 650; 23 S. W. 1012.

"It cannot be denied that the legislature has the power to provide that a corporation may lose its corporate existence without the intervention of the courts, by any omission of duty or violation of its charter, or default as to

limitations imposed, and whether the legislature has intended so to provide in any case depends upon the construction of the language used."

Brooklyn, etc. R. Co. v. Brooklyn, 78 N. Y. 524, 529.

(b) THE STATE MAY WAIVE ANY BREACH INVOLVING THE FORFEITURE OF CHARTER RIGHTS BY IMPLICATION AS WELL AS BY EXPRESS LEGISLATIVE ENACTMENT; SUBJECT, HOWEVER, TO CONSTITUTIONAL PROVISIONS.

The act of 1883 operated as a waiver of the forfeiture which had inured against the Minnesota and Northwestern Company. In the meantime, in 1858, the Constitution of Minnesota had been adopted, requiring equality and uniformity in taxation. Thus In re Brooklyn, etc. R. Co., 75 N. Y. 335, it appears that Chapter 206, Laws 1878, purporting to amend Chapter 575, Laws 1874, in relation to the Brooklyn, etc. R. Co., by extending the time in which said company is required to finish and put in operation its road to five years from the passage of the act, is violative of the constitutional provision which prohibits the legislature from passing "a private or local bill, * * * granting to any corporation * * * the right to lay down railroad tracks."

The third headnote of said case reads as follows:

"The act of 1878 was not simply a waiver of a forfeiture, but inasmuch as at the time of its passage the said corporation had ceased to exist, because of failure to comply with said condition above mentioned, it was the creation

> of a new corporation, an attempt to grant a special charter to construct and operate a railroad, and so came within the constitutional prohibition." Idem. p. 335.

So in the case at bar the Constitution of Minnesota intervened prior to the act of 1883.

A waiver will not revive a corporation after it has ceased to exist, where the Constitution prohibits the granting of special charters.

Thus the Orville & Virginia R. Co. was a corporation created by special law. The corporate life had ceased. A general act of the legislature had been passed recognizing the existence of the corporation. In the meantime a constitutional provision intercepted, prohibiting special charters to railroad companies. They could only be organized under general laws. The court said:

> "But it is claimed that the existence of the corporation is recognized by the act requiring the county to subscribe to the stock of the company. Admitting such to be the case, that will not overcome the difficulty; for a corporation of this character cannot be created by legislative recognition, the Constitution (Article 4, Section 31) prohibiting the creation of corporations, except for municipal purposes, otherwise than by general laws."
>
> O. & V. R. Co. v. Plumas Co., 37 Cal. 362.

The Minnesota Court, in line with the authorities above cited, disposed of this proposition as follows:

> "Under the language of the charter, all its rights therefore 'ceased and were void,' and the charter could have been forfeited by an appropriate act of the State. But no proceedings were taken for that purpose, and it may

be conceded that the act of 1883 was a recognition of the legal existence of that company at that time, and a waiver of the right to declare a forfeiture. But such waiver and recognition were clearly subject to the then existing constitutional mandate, prohibiting the grant of special privileges on the subject of taxation. It is also subject to the constitutional amendment of 1871, which provided in effect, that all gross earnings statutes might be changed or amended by a vote of the people, under the authority of which the statute in question is valid as to the defendant. Insofar as the legislature may be said by the act of 1883 to have intended or attempted to confer upon the Minnesota & Northwestern Company a perpetual two per cent rate, when all other roads were taxed three per cent, it violated the constitutional mandate of equality in taxation and its action was void. The legislature could no more grant this special privilege by the revival of an old corporation than it could confer a one per cent privilege upon an entirely new company.

Neither are the rights of the parties, as urged by defendant, to be construed as of the date the original charter was granted, but, on the contrary, as of the date of the revival of a practically defunct company and the waiver of the right of the state to declare a forfeiture of the charter, namely: at the time of the passage of the act of 1883. At that time the legislature could do one of two things, declare a forfeiture or waive the right, as it did, and continue the authority of the company to proceed and construct its road; but this was necessarily subject to the then existing constitutional restrictions pertinent to the subject of taxation."

(See Appendix).

In the case at bar there was no constitutional inhibition against the recognition of the corporation

by the act of 1883. The inhibition was against the immunity from special taxation as an irrepealable contract.

In the case of Mercantile Bank v. Tenn., 161 U. S. 164, it was conceded by the state that the corporation in question existed under an old charter. Yet the state denied, and successfully, that the bank was entitled to an immunity from taxation originally contained in the charter. The Court said:

> "The corporation may exist under and by virtue of the purchase of the charter * * * and the legislative recognition and the assumption of the state that it is a corporation, and yet not have the title to the exemption, because it is not in fact or in law the same corporation originally incorporated."

On the general proposition of lapsed and repealed powers and unearned immunities, see

Pearsall v. G. N. Ry. Co., 161 U. S. 646.

L. & N. R. Co. v. Kentucky, 161 U. S. 677.

Planters' F. & M. Ins. Co. v. Tenn., 161 U. S. 193.

Picard v. Railroad Co., 130 U. S. 637.

A farther consideration of the effect of Chapter 83, Special Laws 1883 appears under Part IV, infra.

III.

THE TWO PER CENT GROSS EARNINGS TAX PROVISION WAS PERSONAL TO THE MINNESOTA AND NORTH WESTERN RAILROAD COMPANY AND COULD NOT BE TRANSFERRED TO ANY OTHER COMPANY.

The alleged charter of the Minnesota & North Western Railroad Company with all of its amendments, contains no provision extending the gross earnings tax to its successors or assigns. By the language of the two per cent gross earnings law itself (Trans. p. 13,14), the privilege is restricted to the Minnesota & North Western Railroad Company, and all of the obligations connected therewith are imposed upon that company. Neither the privilege nor the accompanying obligation are extended to successors or assigns.

True it is that by Chapter 83, Special Laws 1883, the company was apparently authorized to consolidate its stock, franchises, rights and property with those of any other company which would undertake to build the road. This permission is of no avail to the plaintiff-in-error for three reasons.

First: The language of the statute is not broad enough to authorize, if in fact it was intended so to do, the transfer of the two per cent gross earnings tax privilege of the charter as an irrepealable contract. That the law was ineffectual to authorize such a transfer we shall seek to establish by our argument under this point.

Second: The Legislature in 1883 could not consent to the transfer of an irrepealable contract right to an immunity from, or a special form of, taxation, and in so far as it attempted to do so by chapter 83, the same was unconstitutional. This proposition will be argued under Point IV.

Third: The plaintiff-in-error, a foreign corporation organized and admitted to this state in 1892, was and remains incapable of taking and enjoying any irrepealable contract right in the two per cent gross earnings tax. The argument on this proposition appears under Point VII.

In no event was the authority of the 1883 law available to the C., St. P. & K. C. Co., and whatever authority there was for that company's sale of its property to the plaintiff-in-error is subject as well as the sale itself, to all the objections herein made.

In 60 L. R. A. beginning on page 33, there is an exhaustive note covering the subject, "Corporate taxation in the United States as affected by the contract clause in the Federal Constitution." On page 99, after an exhaustive examination of the authorities, the annotator makes this statement:

> "A general rule deducible from all the authorities is that an exemption from, or a right to a limited taxation, belonging to a corporation, is a privilege altogether *personal* to the grantee, incapable of transference to another, save by a *specific enabling law*, couched in explicit language apt *to the purpose.*"

He cites an array of authorities which is conclusive as to the correctness of his position. We shall examine a few of them.

In Morgan v. La., 93 U. S. 217; 23 L. Ed. 861, there was involved an act incorporating a railroad company which provided that its capital stock should be exempted from taxation and that its shops, rolling stock and other appurtenances should be exempted for two years after the completion of the road within the limits of the state. Under a statute authorizing the execution by railroad companies of bonds secured by mortgages on their property and "franchises" a mortgage was given by the Company in question on the completed portion of its road including the land, equipments, appurtenances, rights and franchises applicable to such completed portion. The Company defaulted and the property was sold on foreclosure to Morgan.

The question was whether, under the designation of "franchises," the immunity from taxation accompanied the property in its transfer to Morgan or whether that immunity was a mere personal privilege and non-transferable. Held, that the immunity did not pass and that the property was exempt from taxation only so long as it remained the property of the Company.

Inter alia, the Court said:

> "Much confusion of thought has arisen in this case and in similar cases from attaching a vague and undefined meaning to the term 'franchise.' It is often used as synonymous with rights, privileges and immunities though of a personal and temporary character; so that if any one of these exists, it is loosely termed a 'franchise,' and is supposed to pass upon a transfer of the franchises of the Company. But the term must always be considered in

> connection with the corporation or property to which it is alleged to appertain. The franchises of a railroad corporation are rights or privileges which are essential to the operations of the corporation, and without which its road and works would be of little value; such as the franchise to run cars, to take tolls, to appropriate earth and gravel for the bed of its road, or water for its engines, and the like. They are positive rights or privileges, without the possession of which the road of the Company could not be successfully worked. Immunity from taxation is not one of them. The former may be conveyed to a purchaser of the road *as part of the property* of the company; *the latter is personal and incapable of transfer without express statutory direction.*"

In Wilson v. Gaines, 103 U. S. 417; 21 L. Ed. 401, it was held:

> "That mere general words of description are not sufficient to extend a sale beyond the subject matter of the lien as defined by the statute, which lies at the foundation of the entire proceeding."

The facts were these: In 1845 the N. & C. Ry. Co. was chartered to build a road from Nashville to Chattanooga. Its capital stock was exempted from taxation forever, and its road, etc., for twenty years from completion.

In 1852 the N. & S. R. R. Co. was incorporated to construct another line of road, and was to "have all the rights, powers and privileges" of the former Company.

In the same year the Edgefield & Ky. R. R. Co. was incorporated to build a road from Nashville to the Kentucky state line with the provision in its charter that it was to have all the powers, rights

and privileges of the original N. & C. Co. In 1852 an act was passed authorizing the Governor to issue to certain railroad companies bonds of the state to aid in the completion of their respective roads wherein it was provided that, upon such issue and the completion of the roads, the State should be invested with a lien upon the roads, including stock, right-of-way , and all property owned by the companies incident to or necessary for the business. By an act of 1854 the privileges of the foregoing act were extended to the Edgefield & Ky. Co.

In 1855 the charter of the Edgefield & Ky. Co. was amended so as to give it all the rights and privileges conferred upon the N. & S. Co. by its charter. The Edgefield availed itself of the foregoing Acts and subjected its property to the statutory lien therein provided for.

An act was passed in 1870 providing for judicial foreclosure on the property of defaulting railroad companies under the bonds to the state. That act contained this provision:

> "That upon the sale of any of the franchises of either of the railroad companies by the Commissioners under the provision of this act, *all the rights, privileges and immunities* appertaining to the franchise so sold under its act of incorporation and the amendments thereto, and the *general improvement law* of the state and acts amendatory thereof, shall be transferred to and vest in such purchaser, and the purchaser shall hold said franchises subject to all liens and liabilities in favor of the state as now provided by law against the railroad companies."

As to the Edgefield Co. it was averred that, under a bill filed to foreclose the state's statutory lien upon the road, superstructure, equipments and stock, and the property owned by the company as incident to or necessary for its business, the road, its franchises, property, rights, privileges and immunities were sold, and the St. L. & S. Co. by sundry *mesne* conveyances had become invested with the title.

It was contended that the road remained exempt from taxation for twenty years after its completion. The State Supreme Court dismissed the bill, holding that the exemption from taxation originally granted to the N. & C. Co. was not one of the privileges which passed to the Edgefield Co., either by its original or amended charter. Without passing on that precise question, the United States Supreme Court held that it was not shown that, if the propery in the hands of the original company was exempt from taxation, that exemption passed to the purchasers at the sale to foreclose the State's statutory lien, under which the complainant claimed. The Court referred to Morgan v. La. *Supra,* as holding that immunity from taxation was a personal privilege and not transferable except under the authority of the legislature, *and that such an exemption does not necessarily attach to or run with the property after it passes from the owner in whose favor the exemption was granted.*

The demurrer to the bill was sustained.

In Gulf, etc. Ry. Co. v. Hewes, 183 U. S. 66; 46

L. Ed. 86, it was held that the words "rights and privileges" were not sufficient to transfer any immunity from taxation.

In the case of C. & O. R. Co. v. Miller, 114 U. S. 176; 29 L. Ed. 121, a mortgage was foreclosed by action under a statute providing that upon a conveyance to the purchaser under such a foreclosure, the old company should *ipso facto* be dissolved and the purchaser should forthwith become a corporation and that "the corporation created by or in consequence of such sale should succeed to all such franchises, rights and privileges * * * as would have been had by the first company but for such sale and conveyance."

The reasoning of the Court was to the effect, and it so held, that the immunity from taxation enjoyed by the old company did not pass to the new one because the latter was subject to the laws in force at the time of its creation, and among such laws were certain ones reserving the right to repeal or amend.

An immunity from taxation does not pass under the terms "property and franchises" in a deed of trust and foreclosure thereunder.

Lake Drummond v. Virginia, 49 S. E. 506.

In a New York case, City of Rochester v. Rochester Ry. Co., 182 N. Y. 99; 74 N. E. 953, 70 L. R. A. 773, it was held that, under a lease of street railway properties:

> "The exemption from the cost of paving the streets which may have been held by the Rochester City & Brighton R. R. Co. was personal and did not pass to the defendant."

The Court cited many cases from the U. S. Supreme Court and said:

> "The language of the statute before us is personal, not attached to the property. It enacts that 'the said Company' not 'Said Company,' 'its successors or assigns' shall not be required to bear any expense of repaving the streets."

Further, on the question whether the right of exemption was personal to the lessor company, the Court said:

> "This has been so held in a number of decisions by the Supreme Court of the United States. Shields v. Ohio, 95 U. S. 319, 24 L. Ed. 357; Railroad Co. v. Maine, 96 U. S. 499, 24 L. Ed. 836; Railroad Company v. Georgia, 98 U. S. 359, 25 L. Ed. 185; Norfolk & Western R. R. Co. v. Pendleton, 156 U. S. 667, 15 Sup. Ct. 413, 39 L. Ed. 574; Yazoo v. Adams, 180 U. S. 1, 21 Supt. Ct. 240, 45 L. Ed. 395; Morgan v. Louisiana, 93 U. S. 217, 23 L. Ed. 860; Wilson v. Gaines, 103 U. S. 317 (26 L. Ed. 401); Cheasapeake & Ohio R. R. Co. v. Miller, 114 U. S. 176, 5 Supt. Ct. 813, 29 L. Ed. 121; Tucker v. Ferguson, 22 Wall. 527, 22 L. Ed. 805. In the Norfolk & Western Railroad case, it was said: 'We have frequently held that, in the absence of express statutory direction, or of any equivalent implication by necessary construction, provisions in restriction of the right of the state to tax the property or to regulate the affairs of its corporations do not pass to new corporations succeeding by consolidation or by purchase under foreclosure to the property and ordinary franchise of the first grantee. * * * This we have stated to be a statutory rule of interpretation, founded upon an obvious public policy, which regards such exemptions as in derogation of the sovereign authority and of common right, and therefore

not to be extended beyond the exact and express requirements of the grant construed *strictissimi juris.* That privilege is not at all similar to such franchises as the right to construct and operate a railroad, to lay gas mains and supply gas, and to maintain a ferry. Those franchises, when granted, became property similar in their general attributes to other property. The grant of such a franchise, even without consideration, is unless a right to revoke is reserved, as effectual to vest an indefeasible title in the grantee as a voluntary conveyance of a piece of land. Not so, however, as to an exemption from taxation or from the exercise of the police power. It is property only granted on a consideration, and if granted without consideration, may be recalled. (See cases cited supra.) Doubtless such exemptions, if attached to property itself, would increase its value; but because they are against common right they will be construed to be personal, and limited to the grantee, unless a contrary intention clearly appears."

The case of Norfolk, etc. Co. v. Pendleton, 156 U. S. 667, cited in the foregoing opinion involved an immunity from interference by the State with the rate of tolls.

The Court held that the immunity provided in the charters of the original companies was personal to them *inasmuch as there was no clause or provision therein which could be interpreted as necessarily meaning that subsequent corporations, organized under later laws, could assert a valid succession to the immunities and privileges granted to them and hence that the same did not pass to the Norfolk & Western Company.*

The Pendleton case was followed and approved

in Covington & L. Turnpike Road Co. v. Sandford, 164 U. S. 578 (41 L. Ed. 560).

In this case the right of the state to regulate tolls was also involved. The original company, by the same name as the plaintiff in error, was incorporated under an act of 1834. Its charter provided that the company should be entitled to fix its rates of toll until net dividends exceeded 14%.

By an act of 1839 amendatory of the act of 1834, it was provided that the stockholders of the company residing south of a certain point might elect a separate board of directors and have entire control of a part of the road located between certain towns; and that stockholders residing north of such point should have separate control of that portion of the road to the north but that the stock should continue joint and common to all the stockholders, after the completion of the road.

In 1851 an act was passed repealing the 1839 act in so far as the stock was to be held jointly and providing for a separation of the stock and an organization under the name of Covington & L. Turnpike Road Co. which should remain separate and independent of that portion of said company owning the stock to the south. The same provision was made as to the stockholders and formation of an independent company to the south. The act, among other things, contained these words:

> "Each company possessing and retaining all the powers, rights and capacities in severalty granted by the act of incorporation and the amendments thereto, to the original company."

In 1890 an act was passed reducing the rate of toll which reduced the net dividends below the point fixed in the charter of the original company. The plaintiff in error, being the company organized to the north as aforesaid, claimed that it was entitled to the immunities of the original company and hence that the act of 1890 impaired its contract. The Court of Appeals of the State of Kentucky overruled this contention. On appeal the Federal Supreme Court, in sustaining the state court on the point, used the following language:

> "These principles are in entire accord with the settled doctrines of this court. When a corporation succeeds to the rights, powers and capacities of another corporation, it does not thereby or necessarily become entitled to an exemption from taxation. An exemption or immunity from taxation so vitally affects the exercise of powers essential to the proper conduct of public affairs and to the support of government, that immunity or exemption from taxation is never sustained unless it has been given in language clearly and unmistakably evincing a purpose to grant such immunity or exemption. All doubts upon the question must be resolved in favor of the public. These are positive rights and privileges, this Court said in Morgan v. Louisiana, 93 U. S. 217, without which the road of a corporation could not be successfully worked but immunity from taxation is not one of them • • •
>
> The same principles should be recognized when the claim is of immunity or exemption from legislative control of tolls to be exacted by a corporation established by authority of law for the construction of a public highway. It is of the highest importance that such control should remain with the state, and it should never be implied that the legislative depart-

ment intended to surrender it. Such an intention should not be imputed to the legislature if it is possible to avoid doing so by any reasonable interpretation of its statutes. It is vital that the state should retain its control of tolls upon public highways as it is that it should not surrender or fetter its power of taxation. We admit there is some ground for the contention that, by the grant in the act of 1851 to each of the two corporations named in it, of 'the powers, rights and capacities' granted to the corporation of 1834, the legislature intended to exempt the new corporations, as it did the original ones, from all legislation that would prevent them from earning as much as 14 per cent on the capital stock expended on their respective roads and for repairs. But as the act of 1851 may not unreasonably be interpreted as intended only to pass to the new corporations such powers, rights and capacities as were necessary to the successful working of the respective roads, and not as exemption from legitimate ordinary legislative control of their affairs and business, it must, in the interests of the public, be so interpreted. It is settled law that in grants by the public nothing passes merely by implication; and if a contract with a state relating to the exercise of franchises is susceptible of two meanings 'the one restricting and the other extending the powers of a corporation, that construction is to be adopted which works the least harm to the state.' Chenango Bridge Co. v. Binghampton Bridge Co. 'The Binghampton Bridge' 70 U. S. 3 Wall. 51, 75 (18; 137, 43); Ruggles v. Illinois, 108 U. S. 526 (27, 812); Stein v. Boinville Water Supply Co., 141 U. S. 67."

In *Phoenix Co. v. State*, 161 U. S. 174; 40 L. Ed. 660, upon the question of a transfer of an exemption from taxes, this language was used:

"If this were an original question, we should

> have no hesitation in holding that the plaintiff in error did not acquire the exemption from taxation claimed by it, and we think at the present time the *weight of authority, as well as the better opinion,* is in favor of the same conclusion which we should otherwise reach."

Under the foregoing decisions, it is clear that by the weight of authority, as well as the better opinion, there is no language in the charters of the Minnesota and Northwestern Co., or any of the amendments thereof, or in the act of 1883, which is sufficient to authorize the transfer, or to transfer the commuted tax privilege.

IV.

IN SO FAR AS CHAPTER 83, SPECIAL LAWS, 1883, WAS AN ATTEMPT TO CONSENT TO, OR PROVIDE FOR, THE TRANSFER OF THE TWO PER CENT GROSS EARNINGS TAX AS AN IRREPEALABLE CONTRACT RIGHT, IT WAS UNCONSTITUTIONAL.

Under the railroad gross earnings tax amendment to the Constitution it was concededly competent for the Legislature, after 1871, to provide for a gross earnings tax on railway properties provided that the law were submitted to and approved by popular vote. Aside from this provision, however, and by reason of the mandates of Sections 1 and 2 of Article 9, of the Constitution, the Legislature has always been incompetent to confer upon any corporation or individual, as a contract right or

otherwise, any such exemption or privilege. To grant to an existing corporation, having any sort of an immunity in the matter of taxation, the right to transfer the same would be in effect for the State to confer it upon the transferee. Such an act would be as invalid therefor as if the Legislature had attempted to confer the immunity directly upon the new corporation. This proposition has been well settled as a principle of Constitutional law governing the decision of questions arising under the contract clause of the Federal Constitution.

Be it remembered that the only language in any sense material to the transfer of the tax exemption, in the act of 1883, is the authority granted the Minnesota and Northwestern Company "to consolidate its stock, franchises, rights and property" with any company that will undertake the construction and operation of the road.

In *Trask v. McGuire*, 85 U. S. 391, 21 L. Ed. 938, under the provisions of a State Constitution similar to those found in Sections 1 and 2 of Article 9, of the Constitution of Minnesota, it was held that the prohibition against special forms of, or exemption from, taxation, applied in "all its force against the renewal of an exemption equally as against its original creation."

In *Louisville & Nashville Ry. Co. v. Palmes*, 109 U. S. 244, 27 L. Ed. 922, there was under review the foreclosure and sale of railway properties, under a statute which declared that the purchasing company should be "deemed in law and equity to

be fully invested with and entitled to all the said property, rights, franchises privileges and *immunities*" of the old company. The Court held that the exemption from taxation which belonged to the defunct company was personal to it and therefore was not transferred by the mortgage and foreclosure. But it also said, and so held, that the alleged transfer and continuance of the exemption failed "for a distinct and deeper reason," which was that the attempted continuance of the exemption in the purchasing company was in violation of the Constitution of Florida which took effect in 1868 and which required uniformity and equality of taxation. On this point the Court said in part:

> "The prohibition which forbids the Legislature from exempting the property of railroad corporations from taxation, makes it impossible for the Legislature to create such a corporation capable in law of acquiring and holding property free from liability to taxation."

The same question was again before the United States Supreme Court in

> Keokuk & Western Ry. Co. v. Missouri, 152 U. S. 301, 38 L. Ed. 450.

It was claimed by the plaintiff in error that it was entitled to the exemption from taxation contained in the original charter of the Alexandria & Bloomfield Railroad Company of which it was the successor in interest. The original exemption had been granted in 1857. In 1865 the State adopted a new constitution prohibiting exemption from taxation. By an act approved March 2, 1869, it was

claimed that the plaintiff in error had become entitled to all the "franchises and privileges" of the old company. Whether this language was sufficient to pass the immunity from taxation was said to be a question of doubt, but the Court disposed of the claim of the plaintiff in error in the language:

> "*But the decisive answer to this objection is that the Legislature had no power, in 1869, to extend to a new corporation created by the consolidation, an exemption contained in an act passed in 1857, before the constitution was adopted*, and hence that, under the terms of this act we cannot hold that immunity from taxation passed as a franchise or privilege to the consolidated corporation. The construction claimed by the defendant would be directly in the teeth of the constitutional provision that no property shall be exempted from taxation. While, as heretofore observed, an exemption from taxation contained in a charter previously granted could not be taken away by this constitutional provision without the impairment of the obligation of a contract, it doubtless applies to all corporations thereafter formed either by original charter or by the consolidation of prior corporations under the act of 1869."

The case of *Yazoo Co. v. Adams*, 180 U. S. 1, 45 L. Ed. 395, is also decisive of the question. The Yazoo Company grew out of a consolidation, one of its predecessors having an exemption from taxation, its claim to which was in issue. Having in mind the decisions to the effect that a consolidation results in a new corporation, the articles of consolidation very adroitly provided that the transaction should not disturb the corporate existence of the old company having the exemption. Notwithstand-

ing this, the court held that a new corporation had been formed and that it was subject to the constitution then in force, the effect of which was to cut off the exemption from taxation.

Inter alia, the Court said:

> "But it is scarcely necessary to say that, if the consolidation of 1892 resulted in a new corporation, it would come into existence under the Constitution of 1890, with the disabilities attached thereto, among which is the provision that 'the property of all private corporations for pecuniary gain shall be taxed in the same way and to the same extent as the property of individuals.' *Even if the Legislature, in these several acts of consolidation, had expressly provided that the new corporation thereby formed should be exempted from taxation, the higher law of the Constitution would be interpreted as nullifying it to that extent.*

It therefore appears conclusively that "the higher law of the Constitution" of Minnesota must be interpreted as nullifying Chapter 83 of the Special Laws of 1883, in so far as the same was an attempt to transfer any contract right in the two per cent gross earnings tax to the new corporation to grow out of the consolidation thereby provided for.

V.

EVEN THOUGH THE TWO PER CENT TAX WAS A CONTRACT RIGHT AS TO THE MINNESOTA & NORTHWESTERN RAILROAD COMPANY IT DID NOT SURVIVE THE CONSOLIDATIONS. THE PLAINTIFF-IN-ERROR, A FOREIGN CORPORATION, CANNOT CLAIM ANY CONTRACT RIGHT, FOR IT WAS SUBJECT TO THE CONSTITUTION AND OTHER LAWS OF MINNESOTA IN FORCE AT THE TIME OF ITS ORGANIZATION AND ENTRY INTO THE STATE. IT WAS THEREFORE INCAPABLE OF TAKING OR HOLDING ANY IRREPEALABLE CONTRACT RIGHT TO A SPECIAL OR LIMITED FORM OF TAXATION.

This case presents the anomaly of a foreign corporation coming into this State and asserting a right to a special privilege which is denied to all citizens of the State, individuals and corporations alike. Instead of subjecting itself to the laws of Minnesota, the plaintiff in error maintains that it is privileged to violate them. If this privilege exists it must be by reason of legislative permission constitutionally granted plaintiff in error. That no such permission has been given is easy of demonstration.

Before proceeding farther it will be well to establish finally the exact character of the plaintiff-in-error. By paragraph one of its answer (Trans. p. 12) the plaintiff-in-error claimed to be a corporation existing "under the laws of the States of Illi-

nois, Iowa, and Minnesota, by certain consolidation proceedings." The consolidation proceedings have already been referred to. Our argument proceeds upon the assumption that the plaintiff-in-error is an Illinois corporation (Trans. p. 47). Whether there has been one or more consolidations is immaterial. Counsel claim that the Minnesota & North Western Railroad was consolidated with the Chicago, St. Paul and Kansas City Company and that company in turn with the Chicago Great Western Railway Company. Accepting their view that the proceedings in each case did constitute a consolidation we now assert that the result was an entirely new company, the identity of the old company being lost in each case.

The situation is practically parallel to the one involved in Keokuk & Western Railway Company v. Missouri, 152 U. S. 301, 38 L. Ed. 450.

In that case, a railroad corporation chartered in Missouri in 1857 with a provision that its property should be exempt from taxation for a limited time, was consolidated with an Iowa corporation in 1870, under a general law of Missouri. It was held that the act of the Legislature of Missouri authorizing the consolidation, making one company of the two, whose stock should be consolidated upon such terms as might be mutually agreed upon, authorizing the adoption of a new corporate name, the exchange of the stock of the constitutent company for stock in the new company, and also providing for the filing with the Secretary of State a copy of the consolidation agreement, which should be conclusive evidence

of the consolidation, was in effect the extinguishment of the prior companies and the formation of a new company.

A similar situation was presented in the case of Yazoo Company v. Adams, 180 U. S. 1, 45 L. Ed. 395. We have already referred to this case and have quoted therefrom. We again call attention to the fact that the consolidation agreement therein involved deliberately tried to avoid the effects of the rule established in the case of the Keokuk Company v. Missouri, by adroitly providing that the consolidation should not disturb the corporate existence of the prior company which had the exemption from taxation. Notwithstanding this clever attempt to avoid that result the Supreme Court held that the consolidation resulted in a new company, subject to all the laws, constitutional and otherwise, in force at the time of its organization.

Inter alia, the Court said (180 U. S. 19, 45 L. Ed. 406):

> "While, as stated in Tomlinson v. Branch, 15 Wall. 460, 21 L. Ed. 189, the presumption is that when two railroads are consolidated each of the united lines will be respectively held with the privileges and burdens originally attaching thereto, *subsequent cases have settled the law* that where two companies agree together to consolidate their stock, issue new certificates, take a new name, elect a new Board of Directors, and the constituent companies are to cease their functions, *a new corporation is thereby formed subject to existing laws.*"

This statement of the law fits this case exactly

and demonstrates that both the Chicago, St. Paul and Kansas City and the Chicago Great Western Companies were new companies and that the identity of the Minnesota and North Western Railroad Company has not in any way been transmitted to either of its successors.

Assuming that both of the so-called consolidations were permitted by the laws of Minnesota and that the plaintiff in error has been lawfully admitted to this State, its franchises and privileges therein were granted to it at or since the time of such entry. The Legislature in providing for its admission to the State, whether such provision was made by the special or general law, could not authorize it to violate any provision of the Constitution, nor could it confer any privilege or franchise prohibited by the Constitution. It follows that there was no way whereby the plaintiff in error could have procured an irrepealable contract right in the two per cent gross earnings tax.

Coming into the State in 1892 *as a foreign corporation, the plaintiff in error could get only the franchises and privileges which the Legislature was then competent and willing to give it. At that time the Legislature could not confer an irrepealable contract right to a special form of taxation. There was no other source from which such a right could be drawn. Certainly no private corporation could confer what the state, by its constitution, was prohibited from giving.*

After the Constitution was adopted, the Legislature was incompetent to make an original grant

of such immunity from taxation or to except railroads from the ordinary *ad valorem* system made mandatory by the Constitution.

It must follow that the right to a special system of taxation, could not be given to a new corporation, nor to an old one under the guise of a renewal of its privileges or the extension to it of the privileges of another. The renewal or extension of such an immunity is as much a sovereign grant as is the original act conferring it on the first taker.

Franchises and similar privileges or immunities can never be conveyed by the unaided act of the corporation owning them. They can be received only from the sovereign and when they are transferred, nominally from one corporation to another, which can be done only by sovereign permission, they are really, and as a matter of legal fact, surrendered to the sovereign by the grantor and by it regranted to the grantee corporation.

To argue otherwise is to say that one corporation, by transferring all its franchises and privileges, could create another. This is of course impossible and its impossibility demonstrates the accuracy of the opposite argument.

The idea has been expressed, with respect to consolidation, in this language:

> "Consolidation is a surrender of the old charter by the companies, the acceptance thereof by the legislature and the formation of a new company out of such portions of the old as enter into the new."
>
> Lauman v. Lebanon v. R. Co., 30 Pa. 42; 72 Am Dec. 685.

For a discussion and approval of this statement, see 60 L. R. A. 53, et seq. The principle has received repeated approval in the decisions hereinafter cited.

It is therefore obvious that the State could not have created in 1883, a new corporation with an irrepealable and unchangeable gross earnings tax privilege. It could not confer such a privilege on either a new or an old corporation by way of original grant or by consenting to a transfer from an old to a new corporation.

The leading case on this subject is *Trask v. Maguire,* 85 U. S. 391 (21 L. Ed. 938.)

The head notes correctly and fully summarize the decision and are as follows:

> 1. "Where the property of a railroad company is, by an irrepealable legislative grant, forever exempted from all state and county taxes, and the State made a loan of its bonds to the road, and acquired a mortgage upon it, and on a failure to pay the interest, the property was sold to the State on Foreclosure of the mortgage: Held, that when the State became the purchaser, the immunity ceased.
>
> 2. Subsequently the road and its franchises were sold by the State to individuals who became incorporated under a state act which conferred on the new Company all the *immunities* which the old company had, under its charter: Held, that the new company thus acquired all the immunity from taxation which the original company had possessed if it were competent for the Legislature at the time, under the new State Constitution, to confer this privilege.
>
> 3. The new State Constitution, in force at the time of the last sale, provided that no property should be exempt from taxation, except

> public, school property; held, *that the inhibition of the State Constitution applies in all its force against the renewal of an exemption equally as against its original creation;* and this inhibition the Legislature could not disregard, in providing for the sale of its property which it had purchased."

The decision of the Court was reached notwithstanding the fact that the State Legislature had provided by its Act of February 19, 1866, that the persons purchasing the roads should have "all the rights, privileges, franchises and *immunities*" of the old company, for whose default, the properties had been sold at foreclosure under the charter and laws applicable, and notwithstanding a further Act of the Legislature, approved March 17, 1868, by which the legislature attempted to confirm in the purchasing company "all the rights, privileges, franchises and *immunities of whatever kind* theretofore belonging to said defunct corporation."

The Court said, *inter alia*:

> "The act under which the sale was made provided that the purchasers of the road should have all the rights, franchises, privileges and *immunities* which were enjoyed by the defaulting company under its charter and laws amendatory thereof, subject to the limitations and conditions therein contained, and not inconsistent with the Act authorizing the sale. The new company thus acquired all the immunity from taxation which the original company originally possessed, *if it were competent for the Legislature at the time, under the new Constitution, to confer this privilege.* The question, therefore, is whether the legislature was competent to grant the immunity claimed under that Constitution, which went into operation on the

> 4th of July, 1865, previous to the passage of any of the Acts authorizing the proceedings under which the new company acquired its rights."

The new constitution referred to prohibited, with certain specifications, all exemptions from taxation, in that respect being substantially to the same effect as Article 9 of the Constitution of this state. Mr. Justice Field wrote the opinion and these are his closing words:

> "The inhibition of the Constitution applies in all its force against the renewal of an exemption equally as against its original creation and this inhibition the Legislature could not disregard in providing for the sale of the property which it had purchased."

The case of *Louisville & Nashville Ry. Co. v. Palmes*, (109 U. S. 244; 27 L. Ed. 922) also involved this question. The transaction under review was a foreclosure on railway properties, under a statute which declared that the purchasing company should be "deemed in law and equity to be fully invested with and entitled to all the said property, rights, franchises, privileges and *immunities* of the old company."

The Court followed Morgan v. Louisiana, and Wilson v. Gaines, *supra*, in holding that the exemption from taxation belonging to the defunct company was personal to it, and was not transferred by the mortgage and foreclosure. It then said that the alleged transfer and continuance of the exemption failed "for a distinct and deeper reason" which

was that the attempted continuance of the exemption in the purchasing company was in violation of the Constitution of Florida which took effect in 1868 and which required uniformity and equality of taxation.

With respect to its position on this point, the Court said:

> "It does not weaken this conclusion to say that the exemption contained in the Internal Improvement Act of 1855 was authorized by the Constitution of the State then in force, which may be admitted, and that it was assignable in its nature or by its terms, in such manner that it became impressed upon the property itself into whosesoever hands it should afterwards come, following the title, like an easement or a covenant running with the land, which we have shown, however, not to be the case; for even on that supposition, the privilege is one that must be exercised by some person capable in law of accepting and exercising it. The conception of an immunity that is impressed upon the things in respect to which it is granted is purely metaphorical. The grant is to a person in respect of a thing, and it is said to inhere in or be attached to the thing, and passes as an incident with the title to each successor. There must always be a person capable not only of receiving the title, but also of accepting the conditions accompanying it, and which constitutes the exemption; otherwise the conditions become impossible and void.
>
> After the adoption of the Constitution of Florida of 1868, there could be no corporation created capable in law of accepting and enjoying such an exemption, for that was prohibited by the constitutional provisions that have been cited. In the case of the Pensacola and Louisville Railroad Company in 1872, the capacity at that time to receive this privilege depended

> altogether on the Legislative Act amending its charter to that effect; and if any doubt as to this might be reasonably entertained, certainly none can arise as to the Pensacola Railroad Company, which derived all its powers and its very existence from legislation dependent for its validity wholly upon the Constitution of 1868. *The prohibition which forbids the Legislature* from exempting the property of railroad corporations from taxation, makes it impossible for the Legislature to create such a corporation capable in law of acquiring and holding property free from liability to taxation."

In 1892 then, the legislature could not create a new corporation capable of receiving an irrepealable exemption from taxation. How, then, could it in that year confer such a power on the plaintiff in error, a foreign corporation?

In Keokuk & Western Ry. Co. v. Missouri, 152 U. S. 301, 38 L. Ed. 350, there was under consideration the claim of the plaintiff in error that it was entitled to the exemption from taxation contained in the original charter of the Alexandria & Bloomfield Railroad Company of which it was the successor in interest. The original exemption had been granted 1857. In 1865 the State adopted a new constitution prohibiting exemptions from taxation. By an Act approved March 2, 1869, it was claimed that the plaintiff in error had become entitled to all the "franchises and privileges" of the old company. Whether this language was sufficient to pass the immunity from taxation was said to be a question of doubt, but the Court disposed of the claim of the plaintiff in error in this language:

> *"But the decisive answer to this objection is that the Legislature had no power, in* 1869, *to extend to a new corporation created by the consolidation, an exemption contained in an act passed in* 1857, *before the constitution was adopted,* and hence that, under the terms of this act, we cannot hold that immunity from taxation passed as a franchise or privilege to the consolidated corporation. The construction claimed by the defendant would be directly in the teeth of the constitutional provision that no property shall be exempted from taxation. While, as heretofore observed, an exemption from taxation contained in a charter previously granted could not be taken away by this constitutional provision without the impairment of the obligation of a contract, it doubtless applies to all corporations thereafter formed either by original charter or by the consolidation of prior corporations under the act of 1869."

The third and fourth head notes of *Gulf, etc., Railroad Company v. Hewes*, 183 U. S. 66 (46 L. Ed. 86), are as follows:

> "3. The charter of the Gulf & Ship Island Railroad Company, granted by Miss. Act, February 23, 1882, even if it be considered as a revival of the rights and privileges which had formerly belonged to a company chartered in 1850, is taken subject to the provision of Miss. Const. 1869, which required the property of such corporation be taxed, like that of individuals, in proportion to its value.
>
> 4. A subrogation by statute of one corporation to the rights and privileges of a former corporation does not include an immunity from taxation."

Following these cases, a state statute attempting to fix in a contractual way the rate of taxation on the gross receipts of a railroad was held subject to

the constitutional provisions in force at the time of its enactment.

> Northern Central Railway Co. v. Maryland, 187 U. S. 258 (47 L. Ed. 167).

After an amendment of a state constitution prohibiting exemptions from taxation, no new corporation is capable of receiving and enjoying old exemptions of this character.

> Bloxham v. Florida, etc., Railroad Co., 35 Florida, 625.

Another case exactly in point is,

> Mercantile Bank v. Tenn., 161 U. S. 161, 40 L. Ed. 656.

In this case it was held that a judicial sale of the charter of a bank did not carry an exemption from taxation, the sale being made after the State Constitution had prohibited exemptions from taxation, although the purchasers of the charter were recognized by the Legislature as a corporation.

Mr. Justice Peckham applied the law to the facts before him in this language (161 U. S. 171, 40 L. Ed. 659):

> "All that Mr. Taylor and his associates could have acquired by the purchase of the charter, after the adoption of the Constitution of 1870, if they acquired anything were the rights and privileges mentioned in the charter, and subject to the provisions of the constitution and laws existing at the time of such purchase."

The Mercantile Bank case was one of the several Tennessee cases, all of which have an important

bearing, in our opinion amounting to control, on this case. They were all decided by the United States Supreme Court on March 2, 1896, and are reported in 161 U. S., beginning on page 134. (40 L. Ed. 645.)

In the case of *Dow v. Beidelman*, 125 U. S. 680, 31 L. Ed. 841, Mr. Justice Gray, writing for an unanimous Court, used the following language:

> "If the * * * Railroad Company as reorganized by the purchasers at the sale under the decree of foreclosure of the previous mortgages, was a lawful corporation of the State of Arkansas, it was not the same corporation as that chartered by the Legislature in 1853, but was a new *corporation, subject to the provisions of the Constitution and Laws in force when it first came into existence, that is to say, in* 1877."

In *Wellman v. Chicago G. & T. Ry. Co.* (Mich.) 47 N. W. 489, it was held that the Railway Company could not complain that a certain act of the Michigan Legislature violated the contract made between it and the State when it became incorporated under the General Railway Laws since it was so incorporated after the adoption of the Constitutional Amendment, which was a part of the General Laws at that time.

The case of *Memphis & L. R. R. Co. v. Commissioners*, 112 U. S. 609 (28 L. Ed. 837), is so conclusive on this point—as well as on others—that we quote it here at length. Mr. Justice Matthews, writing for an unanimous Court, said, *inter alia*:

> "It is a mistake, however, to suppose that

the mortgage and sale of a charter by a corporation, in any proper sense which can be legally imputed to the words, necessarily conveys every power and authority conferred by it, so far, at least, as to vest a title in them, as franchises, irrevocable by reason of the obligation of a contract. In many, if not in most, Acts of Incorporation, however special in their nature, there are various provisions which are matters of *general law*, and not of contract, and are, therefore, subject to modification or repeal.

Such, in our opinion, would be the character of the right in the mortgage bondholders, or the purchasers at the sale under the mortgage, to organize as a corporation, after acquiring title to the mortgaged property, by sale under the mortgage, if, in the charter under consideration it had been conferred in express terms, and particular provision has been made as to the mode of procedure to effect the purpose. It would be a matter of law and not of contract. At least, it would be construed as conferring only a right to organize as a corporation, according to such laws as might be in force at the time when the actual organization should take place, and subject to such limitations as they might impose. It cannot, we think, be admitted that a statutory provision for becoming a corporation in future can become a contract, in the sense of that clause of the Constitution of the United States which prohibits state legislation impairing its obligation, until it has become vested as a right by the actual organization under it; and then it takes effect as of that date and subject to such laws as may then be in force. Such a contract, so far as it seems to assume that form, is a provision merely that, at the time or on the happening of the event specified, the parties designated may become a corporation according to the laws that may then be actually in force. The stipulation, whatever be its form, must be construed as subject and

subordinate to the paramount policy of the State, and to the sovereign prerogative of deciding, in the meantime what shall constitute the essential characteristics of corporate existence. *The State does not part with the franchise until it passes to the organized corporation; and when it is thus imparted, it must be what the government is then authorized to grant and does actually confer.* * * *

It is, of course, the law in force at the time the transaction is consummated and made effectual, and must be looked to as determining its validity and effect. This is the principle on which this Court proceeded in deciding the case of R. R. Co. v. Ga., 98 U. S. 359. The franchise to be a corporation remained in and was exercised by the old corporation, notwithstanding the mortgage of its charter, until the new corporation was formed and organized; it was then surrendered to the State, and by a new grant then made passed to the corporators of the new corporation, and was held and exercised by them under the constitutional restrictions then existing.

Our conclusions, then, are: that the exemption from taxation contained in the 28th Section of the Act of January 11th, 1853, was intended to apply only to the Memphis and Little Rock Railroad Company as the original corporation organized under it; that it did not pass by the mortgage of its charter and works, as included in the transfer of the franchise to be a corporation, to the mortgagees or purchasers, at the judicial sale; that the franchises embraced in that conveyance were limited to those which had been granted as appropriate to the construction, maintenance, operation and use of the railroad as a public highway, and the right to make profit therefrom; and that the appellant not having become a corporate body until after the restrictions in the Constitution of 1874 took effect, was thereby incapable in law of having or enjoying the privilege of holding its property exempt from taxation."

This case was cited by Mr. Justice Peckham in *Mercantile Bank v. Tennessee, supra*, as authority for the following proposition:

> "Such a sale (of a corporate charter and franchises) it has been held, does not transfer to the purchaser the right to be a corporation, but only the right to reorganize as a corporation, *subject to the laws, constitutional and otherwise, existing at the time of the reorganization.*"

A law of West Virginia relating to sales under trust deeds and mortgages, and to judicial sales of railway properties, provided that purchasers thereat should "succeed to all such franchises, rights and privileges * * * as would have been had * * * by the first company but for such sale." The United States Supreme Court held that the new company did not take an immunity or exemption from taxation which belonged to the old company, and that the new company took all grants of corporate powers, rights, privileges and immunities subject to the laws existing at the time of its creation.

Chesapeake & O. Ry. Co. v. Miller, 114 U. S. 176, 29 L. Ed. 121.

See also,

Yazoo Co. v. Adams, 180 U. S. 1, 45 L. Ed. 395,

wherein it was held that a railroad corporation was incapacitated from taking an immunity from taxation held by a predecessor because of the provisions of the Constitution in force when it was organized.

In *Rochester Railway Company v. Rochester*, 205 U. S. 236,

it was held that where a corporation was incorporated under a general act creating certain obligations, it could not receive by transfer from another company an exemption inconsistent with the Constitution and laws then applicable, and this, even though the legislative authority undertook to transfer the exemption by words which clearly included it. The previous decisions of the Court are collated on page 254. Concerning them, the Court, speaking by Mr. Justice Moody, said:

> "The principle governing these decisions, so plain that it needs no reasoning to support it, is that those who seek and obtain the benefit of a charter of incorporation must take the benefit under the conditions and with the burdens prescribed by the law then in force, whether written in the Constitution, in general laws, or in the charter itself."

The latest utterance of the Supreme Court of the United States upon the question is found in its decision of

Yazoo and Mississippi Valley Railroad Company v. The Mayor and Aldermen of the City of Vicksburg, 209 U. S. 358,

decided April 6th, 1908. Again the question before the Court was as to whether or not an exemption from taxation enured to the benefit of a consolidated corporation, and successor to the original holder of the exemption. The new corporation came into effect after the adoption of the Mississipi Constitution of 1890, which prohibited the exemption of

corporate property from taxation. With respect to this situation the Court said:

> "We think that it is entirely clear that the effect of organizing the consolidated corporation after the adoption of the Mississippi Constitution of 1890 was to bring the new corporation within the terms and limitations of that constitution, which prohibited exemption of corporate property from taxation. The exemption to the former constituent company could not inure to the consolidated company without, in effect, ignoring the constitutional provision."

Reference is then made to the Rochester case last above cited. The Court closes its opinion with the following words:

> "The formation of the consolidated company was not imposed upon the complainant; it had the privilege of standing upon such rights as it had by contract or otherwise under the former legislation in force before the adoption of the new constitution. When it saw fit to enter into the consolidation and form a new corporation in 1892 the constitution then in force in the State became the law of its corporate being, and the requirement that corporate property should not be exempt from taxation then became binding upon it, as upon all other corporations formed under the new organic law."

VI.

THE SUPREME COURT OF MINNESOTA HAS NEVER ADJUDGED THAT A TERRITORIAL CHARTER EXEMPTION FROM TAXATION WAS APPURTENANT TO THE RAILROAD SO AS TO PASS THEREWITH INTO THE OWNERSHIP OF A COMPANY WHICH DID NOT UNDERTAKE TO AND DID NOT CONSTRUCT OR COMPLETE THE ROAD COVERED BY THE CHARTER, AND TO SECURE THE CONSTRUCTION OF WHICH THE SAME WAS GRANTED. IN SO FAR AS THE EXEMPTION HAS BEEN HELD AN APPURTENANCE IT HAS NEVER BEEN ADJUDGED TO BE SUCH AS AN IRREPEALABLE CONTRACT RIGHT.

It is to be observed at the outset, that notwithstanding the contentions of the plaintiff in error that the decisions of the Supreme Court of Minnesota have held that the exemptions of taxation in question are irrevocable contracts which are appurtenant to the railroad and pass to any company that may acquire the ownership thereof, this court, when construing a statute on the question whether it is a contract, and in determining whether, if there be a contract, its obligation has been impaired by subsequent state legislation, is not bound by previous state decisions, and will decide the matter independently thereof.

County of Shelby v. Union & Planters' Bank, 161 U. S. 149.

Citizens' Bank v. Owensboro, 173 U. S. 636.

(a) THE DUAL NATURE OF THE GROSS EARNINGS SYSTEM OF TAXING RAILROADS.

It is to be remembered that the gross earnings system of taxation of railroads has ever been deemed a convenient one and likely to produce the best results. In short, it is the payment of a direct tax to the state measured upon the gross earnings of the company, in lieu of all other taxes. It is still a tax upon the property, franchise, stock, capital, rolling stock and all property of the company used for railroad purposes. It is a property tax commuted upon the earnings, and the payment of the percentum tax pays the tax resulting otherwise upon general lists. The Supreme Court of Minnesota has recognized this status throughout all its decisions, and reference thereto is superfluous.

Besides the commuted system thus referred to, peculiar to railroad properties, as such, there runs through all the gross earnings taxing provisions the separate subject matter of the taxation of the lands granted in aid of railroads. In passing it is well to have in mind the general history of the land grants in aid of railroads; that, peculiarly, the lands thus granted, to be of aid to said railroads, should not be taxed but should be exempt until sold or contracted to be sold.

Two features thus appear; the commuted railroad property tax and the specific exemption of the lands. The consideration of the exemption of the lands may be considered to be both the acceptance of the grant by the company, and the performance of the conditions of the grant, and the annual pay-

ment of the gross earnings tax. The subject matter of the lands is clearly an exemption from taxation and the commuted tax, as far as it is claimed to be an irrepealable contract, is likewise in the nature of an exemption from other or farther taxation, which brings the case within the rules of construction applicable to exemptions from taxes when they are claimed to exist as contract rights which cannot be impaired.

The dual proposition is thus distinguished by the Minnesota Court:

> "Two distinct provisions on the subject of taxation were embodied therein (the Charter) the first providing for a gross earnings tax in lieu of all other taxes and assessments, and, second, an exemption of the land granted until sold or contracted to be sold by the company."
>
> State v. G. N. Ry. Co., 106 Minn. 323.

and again:

> "A distinction must not be overlooked, when considering the assignability of a tax exemption, between those imposing a commuted system in lieu of property taxes and those exempting specific property. In the former case the system does not attach to the corporation or concern thus taxed nor to any particular property, and necessarily is personal and not assignable. But where, as in the case at bar, specific land is granted to a railroad company to aid in the construction of a railroad, and is specifically exempted from taxation until sold by the company, and the company accepts in consideration of the exemption, the exemption attaches to and follows the land. State of New Jersey v. Wilson, 7 Cranch, 164, 3 L. Ed. 303; State v. Hicks, 9 Yerg. (Tenn.) 486. 30 Am. Dec. 423; International v. State, 75 Tex. 356, 12 S. W. 685. In such case, as we have

frequently held, as will be shown later, the exemption is appurtenant to and passes with the land to a succeeding corporation assuming the burden attached to it."

(b) THE STEVENS AND TRAVERSE COUNTY CASES.

An examination of two of the Minnesota decisions is a review of all the cases, so far as here material, because in them the former adjudications are reviewed.

The two cases referred to are:

Stevens County Case, 36 Minn. 467 (1887).

Traverse County Case, 73 Minn. 417 (1898).

The *Stevens County Case* was certified to the Supreme Court on a judgment of the District Court in proceedings to enforce the payment of taxes on lands which the Manitoba Company had contracted to sell, but which had not yet been conveyed to the purchasers, they not having performed under the contracts. The case was before the Court *upon the answer of the company*, the allegations of which had been stipulated to be true. Among these allegations was one to the effect that "all the property, rights, franchises, immunities, exemptions and privileges at any time possessed," by the Minnesota and Pacific, the St. Paul and Pacific and the First Division Companies, or either of them "including the exemption from ordinary taxation * * * pertaining to said line of railroad and said granted lands," had passed to the Manitoba Company by the foreclosure sales,

and had been "fully confirmed" in said company by the Act of the Legislature approved March 7, 1881, entitled "An Act Confirming the organization and certain purchases of the St. Paul, Minneapolis and Manitoba Railway Company." Idem. pp. 467-8-9.

The decision of the Court was expressly based upon this stipulation as against the attempt to claim that the exemption in favor of the First Division Company never passed by mortgages and their foreclosures to the Manitoba Company. The Court said, thereby avoiding a decision on the question, that:

> "By the admitted facts to which we have referred, the contrary is established *for the purposes of this case* and we forbear considering this question, upon which, as was intimated by the Attorney General when the cause was presented, he should have desired to be heard on the part of the state if the question had been open for consideration."

This language is found in 36 Minn. page 473, and the Court continued:

> "And for the same reason, the constitutionality of the act of 1881, confirming in this respondent its asserted rights, will not be considered. It is unimportant, except as it might bear upon the fact as to the acquirement by the respondent of the title to these lands with the pre-existing right of exemption, *which facts are admitted.*"

It is thus made clear that the Court carefully and expressly avoided deciding either that the three per cent gross earnings tax privilege passed to the Manitoba Company as an irrepealable contract, or

that it was within the power of the State to countenance any conveyance which sought to vest such a privilege in that Company, or to confirm the same.

Neither did the Court hold that the exemption from ordinary taxation was appurtenant to the railroads, and, having reviewed all the cases, it was not of the opinion that such was the effect of the former decisions. What it did hold, after such review of the former cases, and what it did state as their effect was this (page 470):

> "That the exemption from ordinary taxation, created in 1857, in favor of the Minnesota and Pacific Railroad Company, subsequently passed *with the lands, and as a right appendant thereto* to the St. Paul and Pacific Railroad Company, and to the First Division of the St. Paul and Pacific Railroad Company."

This language necessarily excludes the idea that the exemption from ordinary taxation was appurtenant to the railroad. It goes to the extent only of saying that the exemption was appurtenant to the land grant.

It will be noted from the citations on page 470 that all of the former decisions were considered by the Court, and that this case stands as a re-statement and review of the conclusions therein reached. Yet there is no statement to the effect either that there was an irrepealable contract right in the three per cent gross earnings tax, or that the same was appurtenant to any line of road.

We come now to the *Traverse County* case, and find its language and the scope of the decision restricted in the same careful manner.

Proceedings were instituted in the District Court to enforce the payment of taxes upon lands included within the Congressional grants. The property taxes had already been paid under the three per cent commutation. The Manitoba Company filed objections and upon judgment in its favor, again on a stipulation of facts, the case was certified to the Supreme Court upon twelve questions which were reduced to one by Mr. Justice Mitchell, which he thus stated:

> "Are these lands, upon the facts, subject to taxation in the ordinary way?"

After stating briefly the history of the gross earnings tax litigation down to that time, he further stated that the Manitoba Company became "the owner of all the railroads, property, granted lands and all rights, franchises, privileges, immunities and exemptions at any time possessed by the mortgagor companies, or either of them, in so far as such rights, privileges, immunities and exemptions could be legally mortgaged, assigned or conveyed by said companies, or either of them, or acquired by purchase at such mortgage foreclosures or otherwise."

He then proceeds as follows (73 Minn. 423):

> "Counsel for the state concedes that, under the doctrine of the Parcher case, these lands, at least so far as included in the original congressional grant of 1857, were exempt from this form of taxation in the hands of the First Division Company. That case was decided 29 years ago, and has been repeatedly followed or recognized by this Court as the law. It has

become a law of property, and must be adhered to.

But the chief contention of the state is that this immunity of its road, lands, etc., from the ordinary taxation was not a franchise or attached to the property, but a mere personal privilege to the First Division Company, which could not be transferred, by mortgage or otherwise, to any other company. And counsel has cited numerous authorities from other jurisdictions, and particularly from the Supreme Court of the United States, as supporting his contention."

The correctness of the position thus taken by Attorney General Childs is tacitly acknowledged by the Court, for they leave it without comment, and thus state their reasons for holding against it:

"But we have in this state a body of law commencing over 40 years ago, made up of the acts of the legislature, the practical construction of these acts by the executive department of the government, and the judicial construction of them by our Courts, which must control the decisions of this question as applied to these old territorial 'land grant' railroad companies, without reference to the general doctrine or the decisions in other jurisdictions on the subject.

It is part of the legislative history of Minnesota, both as a territory and a state, that its policy in regard to taxing land-grant roads was adopted with reference alike to facilitating the early construction of these lines of road and to securing to the state what was supposed an ultimate and adequate return for the value of the franchises conferred, and which would, in the long run, be the equivalent of the companies' fair share of taxation. The policy adopted was to provide for these companies paying to the state a certain percentage of their gross earnings in lieu of all other taxa-

> tion on their railroads, and also on their granted lands until sold by the company; this latter being (unfortunately, as subsequent experience has proven) without limitation as to time. The object of this was not to grant a personal favor to the original companies, but *to secure the construction of the lines of road.* Hence, as might be naturally supposed, the history of legislation, as well as the decisions of this Court, clearly indicate that the general understanding was that this system of taxation was not personal to the original company, but was to be alike applicable *to any of their successors which might assume the completion of the road."*

This language makes it clear that Mr. Justice Mitchell, and the other learned Justices who concurred with him, were not of the opinion that it had been held previously, or that it should then be determined that the exemption from ordinary taxation would pass to any company, but only to one which might receive the franchises and land grant of the former companies and thereupon and in consideration thereof "assume the completion of the road."

It did not appear in that case that the Manitoba Company did not earn any of the land grant of the Minnesota and Pacific, or construct and complete any of the lines authorized by its charter. On the contrary, it must have been assumed erroneously, and the assumption was undoubtedly based upon the stipulation, that the Manitoba Company did construct and complete some of the road in question so as to earn or at least complete the earning of the land grant. This was undoubtedly the case,

as the Manitoba Company did earn a land grant, as we understand it, but it did not earn any of the original Minnesota and Pacific land grant, because it did not complete any of the lines of that Company.

Again does the Court (73 Minn. 424) undertake to review its former decisions and restate their result, and it does so in this language:

> "The decisions of this Court from the Parcher case down have all been to the effect that this exemption from ordinary taxation was not simply a personal privilege conferred upon the original company, *but was appurtenant to the line of road, and existed in favor of any company which, in consideration of the land grant, should assume the construction and maintenance of the line by which it was applicable;* that the immunity as well as the burden passed to any company which acquired the road, and assumed its operation and the performance of *all the other duties which the original companies owed to the public.*"

We now come to the language (page 426) which shows that the Court considered it immaterial whether the Manitoba Company could depend upon the Territorial Charter, and which makes it evident that the decision was not based upon that ground, for it said:

> "But it is immaterial whether these acts were or were not valid when originally enacted, for the reason that they were validated by the constitutional amendment of 1871 (State v. Luther, 56 Minn. 156, 57 N. W. 464); and it could not be claimed in any event that they were repealed or modified prior to the passage of the Anderson bill in 1895."

And after stating that the State could not collect for any one year taxes under both the gross earnings and the ordinary system, and in order to make clear the limited effect of the decision then being announced, it is said:

> *"The question whether the legislation on the subject involves the elements of a contract between the defendant or its predecessor and the State is not necessarily involved, and need not be considered."*

And the conclusion of the Court, and the only thing by it adjudged, was thus stated:

> "Our conclusion is that the Court below correctly decided that these lands were not subject to ordinary taxation in 1894, and that its judgment should be affirmed. It is so ordered."

The Traverse County case is the most favorable expression of the law for the defendant that can be found. Yet it is expressly stated there, as it was in the Luther case, on rehearing (56 Minn. 165), that *the question of whether the gross earnings laws were contracts was not before the Court and was not decided.*

After a careful review of the decisions, Mr. Justice Mitchell states (73 Minn. 424) that it had been held that "this system of taxation was not personal to the original company, but was to be alike applicable," *not to all or any of its successors, but only "to any of their (its) successors which might assume the completion of the road."*

In the next paragraph there is a repetition of the same idea in the same carefully selected and re-

strictive language. He said, not that the exemption was appurtenant to the line of road, and existed in favor of any company which might own or lease the road, but that it, "was appurtenant to the line of road, and existed in favor of *any company which, in consideration of the land grant, should assume the construction and maintenance of the line by (to) which it was applicable.*"

In support of our contention that the Supreme Court of this State has never held that any of the gross earnings laws constitute an irrepealable contract, we call the Court's attention to the fact that all the decisions were carefully examined by the Supreme Court of the United States when the Stearns case was before it (179 U. S. 223, 45 L. Ed. 162.)

Referring to the concurring opinion of Mr. Justice White (Mr. Justice Harlan, Mr. Justice Gray and Mr. Justice McKenna concurring), we find this language:

> "Nor does it seem to me that the decisions of the Minnesota Courts, which are referred to as showing that under the Constitution of that State it was competent for the Legislature to enact a gross receipt tax law and provide for its continuance by an irrepealable contract, sustain the proposition deduced from them. *In no single one of these cases was the question of irrepealable contract presented, considered, or decided in any form.*"

The line of decisions thus closed by the Traverse County case (disregarding now the Luther and Stearns cases) began with the Parcher case in 14 Minn. 297 (Gil. 224).

The issue in that case was as to the exemption of the granted lands from ordinary taxation. It was held that this exemption had passed from the Minnesota and Pacific Company, to the State; thence to the St. Paul and Pacific Company, and finally to the First Division Company. *The exemption could not have been held appendant to the railroad, for when the property was transferred to the State, and again when it was regranted to the St. Paul and Pacific Company, there was not a mile of road to which it could attach.*

In addition to this very compelling fact, the language used by the Court (page 253) shows that the right was regarded as appurtenant to the lands, and not to the lines. They said:

> "And as it was not a personal and inalienable right, there is no reason why it would not pass with the lands, and as appendant thereto, to the State."

Again it is stated that certain facts were not without weight in considering whether the *grant of lands, without the exemption* would have induced the building of the lines.

The case of

State ex rel. Marr v. Stearns, 72 Minn. 200,

decided May 11, 1898, was the first case in which the question of an irrepealable contract right in the gross earnings tax law was presented. The claim was denied by this Court, and, although its decision was reversed, the Supreme Court of the United contract.

States did not hold that there was an irrepealable

Stearns v. Minn. ex rel. Marr, 179 U. S. 223, 45 L. Ed. 162.

The Stearns case involved the validity of the so-called Anderson Law, G. L. 1895, Chapter 168, whereby it was attempted to tax railroad lands in the ordinary way. The Minnesota Court sustained the law. The United States Supreme Court held it invalid. Four of the Justices, speaking through Mr. Justice Brewer, held that, independently of its Constitution, it was competent for the State as a trustee of the lands, to transfer them to the railroad companies with an exemption from ordinary taxation.

Mr. Justice Brewer, speaking for this Court with reference to the Amendment of 1871, said:

> "The constitutional amendment of 1871 forbade any change by repeal or amendment of laws respecting the taxation of railroad companies except upon a vote of the people. The converse of that proposition may be accepted, to-wit: that by a vote of the people the tax provision concerning railroads might be repealed or amended. But is there no limitation upon the power of amendment?" Idem p. 238.

Four of the Justices, speaking through Mr. Justice White, were of the opinion that the State had the right to repeal or amend the gross earnings laws, but that such right did not justify the withdrawal of the lands from the protection of the laws, while continuing the full obligation as to all other railroad property. Mr. Justice Brown alone suggested that it was too late to question the validity of the gross earnings tax laws. And even he did not seem to contemplate the possibility of the State's being prevented from increasing the rate.

Prior to the enactment of the Anderson bill in 1895, there was no law specifically attempting to tax railroad lands. In the Parcher, Stevens County and Traverse County cases, the question was

whether, without such a law, the lands were subject to ordinary taxation. *Until the Legislature attempted to change the law, which it did not do until* 1895 *by the Anderson bill, no question could or did arise as to its right to do so. Therefore, such right was not involved in any decision prior to the Stearns case.* Until then, this Court not only did not pass upon the question, but had no proper occasion for doing so.

Some statements there are, and they are all prominently quoted in the plaintiff in error's brief, which seem to sustain the claim that the two per cent gross earnings tax privilege is appurtenant generally to the railroad. Such statements, upon examination, are found to be *obiter*. At most they can only be construed with reference to the land grant exemption. They are the result of a failure to distinguish between the privilege as an appurtenance continuing as long as the laws remained unchanged, and the same privilege as a contract right, protected from any change.

For an example of such a statement, ignoring the distinction just indicated, see the concluding sentence of the decision in

State v. St. Paul, M. & M. Ry. Co., 30 Minn. 311.

There is no decision of the Minnesota Court that the taxing provision of a territorial charter whether as a system or at a specific rate has descended to a successor company, like the plaintiff in error as an irrepealable contract.

(a) NO IRREPEALABLE CONTRACT RIGHT WITHIN THE PROTECTION OF THE IMPAIRMENT CLAUSE OF THE FEDERAL CONSTITUTION CAN ACCRUE TO THE PLAINTIFF IN ERROR ON THE FAILURE OF THE STATE COURT TO FOLLOW THE DECISIONS OF THIS COURT.

Be it remembered that the one thing before the Court in the Stevens and Traverse County cases was the taxing provision as far as it covered the land grant. As has been pointed out, there was a specific exemption of the land grant, and the commuted tax paid the tax on the railroad property generally. See Todd County case, 38 Minn. 163.

In so far as the language used by the Court, by its terms may be held to include the entire taxing provisions, both the gross earnings tax and the land exemption in the Stevens and Traverse County cases, and in so far as it may be held to include the per centum tax as covering the person of the company, or any successor, certainly this Court is not bound by the failure of the Minnesota Court to adopt and apply the law of this Court regarding such successorship. No contract right or rule of property can accrue within the protection of the impairment clause of the Federal Constitution by the failure of the State Court to follow the law as laid down by this Court.

Shelby County v. Union, Etc. Bank, 161 U. S. 151.

Citizens' Saving Bank v. Owensboro, 173 U. S. 648.

VII.

EVEN THOUGH THE DECISIONS OF THE SUPREME COURT OF MINNESOTA WERE TO THE EFFECT CLAIMED FOR THEM BY THE PLAINTIFF IN ERROR, THEY WOULD NOT BE CONTROLLING, WHETHER UNDER THE RULE OF ESTOPPEL, RES JUDICATA, STARE DECISIS OR RULE OF PROPERTY.

A detailed examination of the Minnesota cases bearing upon the case at bar will be reserved for a separate subdivision of this brief. Suffice it here to set forth certain rules deemed to be applicable under the above heading.

We must bear in mind that this is a direct action by the State of Minnesota for the recovery of gross earnings taxes. It is the feature of gross earnings taxes in Minnesota that they are payable directly into the state treasury. Chapter 253, General Laws 1905. Section 1003 et seq., Revised Laws of Minnesota, 1905.

Personal property taxes and taxes upon real estate upon general lists are paid directly into the county treasury. Section 878, et seq., Revised Laws 1905.

It must be conceded that the case at bar stands alone as a direct action by the State for the recovery of gross earnings taxes, and likewise stands alone in respect to the issue raised by the answer as to the right of the State to increase the rate of gross earnings taxes.

As a preliminary statement respecting the authorities relied upon by the plaintiff in error, as constituting an estoppel, a rule of property, res judicata and stare decisis against the State, it is proper here to note that such decisions involved, among other inapposite things, and that was the thing decided,

1. Whether the grants of lands in aid of railroads were exempted from ordinary taxation.

First Div. Co. v. Parcher, 14 Minn. 297 (Gil. 224).

County of Stevens v. Manitoba Co., 36 Minn. 469.

County of Traverse v. Manitoba Co., 73 Minn. 417.

State v. Luther, 56 Minn. 156.

2. Whether taxable gross earnings included rentals; in short the definition of gross earnings.

State v. Manitoba Co., 30 Minn. 311.

3. Whether a special assessment for a local improvement can be imposed against the real estate of a railroad company.

City of St. Paul v. St. Paul and Sioux City R. R. Co., 23 Minn. 465.

First Div. Co. v. City of St. Paul, 21 Minn. 526.

4. Whether a lessee having running rights was liable to pay the tax on the gross earnings derived from the operation of the leased line.

State v. N. P. R. R. Co., 32 Minn. 294.

5. Whether the exemption from taxation in lieu of the gross earnings tax obtained as against large tracts of timber land purchased by the company, from which to take timber to be converted into ties and timber to be used by the company.

County of Todd v. Manitoba Co., 38 Minn. 163, (179 U. S. 237).

6. Whether by a separate statute so providing, the state may tax unused railroad lands upon general lists.

State v. Stearns, 72 Minn. 200 (179 U. S. 305).

(A) THE QUESTION OF ESTOPPEL AND RES JUDICATA.

Confessedly there can be no reliance placed upon the doctrine of estoppel by judgment or res judicata. The judgments in the several cases relied upon by plaintiff in error are no bar here.

The judgments in said actions having arisen upon different demands and between different parties, involving different issues, as has been pointed out, supra, it is submitted that the points in said decision are not binding here. In short the thing has not been adjudicated so as to be a bar now.

The difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action, upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action is well stated in the case of Cromwell v. County of Sac, 94 U. S. 351.

"This was an action on four bonds of the County of Sac, in the State of Iowa, each for $1,000, and four coupons for interest attached to them, each for $100. The bonds were issued in 1860, and were made payable to bearer, in the City of New York, in the years 1868, 1869, 1870 and 1871, respectively, with annual interest at the rate of ten per cent a year.

To defeat this action, the defendant relied upon the estoppel of a judgment rendered in favor of the county in a prior action brought by one Samuel C. Smith upon certain earlier maturing coupons on the same bonds, accompanied with proof that the plaintiff Cromwell was at the time the owner of the coupons in that action, and that the action was prosecuted for his sole use and benefit."

As bearing upon the relation of the first judgment as an estoppel against the prosecution of the second action, the court said:

"In considering the operation of this judgment, it should be borne in mind, as stated by counsel, that there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case, the judgment, if rendered upon the merits, constitutes an aboslute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. Thus, for example, a judgment rendered upon a promissory note is conclusive as to the validity of the instrument and the amount due upon it, although it be subsequently alleged that per-

fect defenses actually existed, of which no proof was offered, such as forgery, want of consideration, or payment. If such defenses were not presented in the action, and established by competent evidence, the subsequent allegation of their existence is of no legal consequence. The judgment is as conclusive, so far as future proceedings at law are concerned, as though the defenses never existed. The language. therefore, which is so often used, that a judgment estops not only as to every ground of recovery or defense actually presented in the action, but also as to every ground which might have been presented, is strictly accurate, when applied to the demand or claim in controversy. Such demand or claim, having passed into judgment, cannot again be brought into litigation between the parties in proceedings at law upon any ground whatever.

But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action."

"It is not believed that there are any cases going to the extent that because in the prior action a different question from that actually determined might have arisen and been litigated, therefore such possible question is to be considered as excluded from consideration in a second action between the same parties on a different demand, although loose remarks looking in that direction may be found in some

opinions. On principle, a point not in litigation in one action cannot be received as conclusively settled in any subsequent action upon a different cause, because it might have been determined in the first action."

Nor can counsel for plaintiff in error claim the former decisions as the law of the case for such doctrine only obtains in the same action upon a new trial as to points in judgment in a former trial.

Bradley v. Norris, 67 Minn. 48.

An adjudication is conclusive only as to those matters capable of being controverted between the parties at the time and as to conditions then existing, and cannot operate as an estoppel to another action or proceeding, which, though involving the same rights passed upon, is yet predicated upon facts which have arisen subsequent to the former adjudication.

24 Am. & Eng. Encyc. of Law, page 777.

Guilford v. Western Union Tel. Co., 59 Minn. 332, (50 Am. St. Rep. 407.)

So, for obvious reasons, a judgment cannot be conclusive as to a matter which was not in issue in a former action and which could not properly have been litigated therein.

24 Am. & Eng. Encyc. of Law, page 775.

"The conclusive character of a judgment extends only to identical issues, and they must be such not merely in name, but in fact and in substance. If the vital issue of the latter litigation has been in truth already determined by an earlier judgment, it may not

again be contested, but if it has not,—if it is intrinsically and substantially an entirely different issue, even though capable of being described in similar language, or by a common form of expression,—then the truth is not excluded, and the judgment is no answer to the different issue."

Village of Wayzata v. Great Northern Ry. Co., 67 Minn. 385.

"It is well settled that, in order to render a matter res judicata, there must be a concurrence of the four conditions, viz: (1) *Identity in the thing sued for;* (2) *Identity of the cause of action;* (3) *Identity of persons and parties to the action, and* (4) *Identity of the quality in the persons* for or against whom the claim is made."

Lyon v. Perin Mfg. Co., 125 U. S. 700.

These rules may be subject to limitations, such as different causes of action, or identity of issues, but such limitations are all inapposite here.

Railroad Co. v. United States, 168 U. S. 1, 48.

(B) THE QUESTION OF STARE DECISIS AND RULE OF PROPERTY.

While not the same, a certain analogy exists between the doctrines of estoppel, res judicata, law of the case, stare decisis and rule of property. Accordingly what is said under the several subdivisions of this argument, has to do with the general question whether the state is barred in the instant case by the decisions of the Supreme Court of Minnesota relied upon by the plaintiff in error. It is not insisted that the statements of principles are

collated under the sub-headings with absolute precision.

The limitations of the rule of stare decisis are thus stated in Wells on Res Adjudicata and Stare Decisis:

> "Nevertheless, the rule must not be so rigidly pressed as to shield error needlessly, or shut out advanced knowledge. * * * And so, if even a rule of property is established by a series of decisions resulting, however, in a dangerous monopoly, and in effect setting aside a wholesome provision in the constitution designed to suppress such abuse of the rights of property, the rule thus established may properly be abrogated by overruling the decisions under which it grew up to so dangerous and overwhelming an influence in contravention of public policy. And although prior decisions are not lightly to be departed from, yet any error may be corrected when no substantial injury is to be expected from the change, or when the evils of adherence are manifestly greater than those of departure. * * * Where this (the error) is clear and a plain rule of law is manifestly violated, and especially if the rule established is mischievous rather than beneficial to the community at large, in its practical operations, * * * it should be abrogated without delay."

In the 26th *Am. & Eng. Ency. of Law*, second edition, page 183, there is this statement:

> "This doctrine is not an arbitrary rule of positive law which forbids the questioning, under any circumstances, of all decisions or the exercise of judicial discretion in relation thereto, but is subject to reasonable limitations. There are clear and palpable mistakes of law which should be corrected, especially when it can be done without injury to any person or property. If no injury or injustice would result to any one, and a future and permanent

benefit would undoubtedly result, the correction should be made at once. No prior decision is to be reversed without good and sufficient cause, yet the rule is not in any sense iron-clad, and the future and permanent good of the public is to be considered rather than any particular case or interest. Even if the decision affects real estate interest and titles, there may be cases where it is plainly the duty of the court to interfere and overrule a bad decision. Precedent should not have an overwhelming or despotic influence in shaping legal decisions. No elementary or well settled principle of law can be violated by any decision for any length of time. The benefit to the public in the future is of greater moment than any incorrect decision in the past. Whenever a correction can be made without working more harm than good, it should be done."

Chancellor Kent, in volume 1 of his Commentaries, on page 477, makes this observation:

"But I wish not to be understood to press too strongly the doctrine of *stare decisis*, when I recollect that there are more than one thousand cases to be pointed out in the English and American books of report which have been overruled, doubted, or limited in their application. It is probable that the records of many of the courts in this country are replete with hasty and crude decisions; and such cases ought to be examined without fear, and revised without reluctance, rather than to have the character of our law impaired, and the beauty and harmony of the system destroyed by the perpetuity of error. Even a series of decisions are not always conclusive evidence of what is law; and the revision of a decision very often resolves itself into a mere question of expediency depending upon the consideration of the importance of certainty in the rule, and the extent of property to be affected by a change of it."

Disposing of the contention that a former decision has established a rule of property, the Supreme Court of Minnesota has said, speaking through Mr. Justice Mitchell:

> "It is an elementary principle that an erroneous decision is not bad law; it is no law at all, and never was the law. It is the law of the particular case, and is binding on the parties before the court, but does not conclude other parties having rights depending upon the same question."
>
> Bradshaw v. Mill Co., 52 Minn. 66.

In *Boyd v. Alabama*, 94 U. S. 645, it was held that a decision in a former case to the effect that a statute constitutes a contract, and that an act repealing it is void is not an estoppel to a subsequent decision holding that the former statute itself is unconstitutional.

In *Adams v. Yazoo, etc., Ry. Co.*, 77 Miss. 184, 60 L. R. A. 35, there were under consideration questions identical with those now before this court. The plaintiff was a corporation formed by the consolidation of certain older companies one of which had an exemption from taxation the benefit of which the new company claimed. Theretofore it had been held by the Supreme Court of Mississippi that the grant of the exemption by the legislature was constitutional, and that the very consolidation in question had not resulted in a new corporation. *On both questions the former decisions were expressly overruled.* The case is so nearly parallel with this one and has such an important bearing thereon, having been afterwards

affirmed by the United States Supreme Court, that we submit the following quotations therefrom, with certain parenthetical additions of our own. With respect to the contention that the former decisions constituted an estoppel upon the State, and that they were binding under the rule of *stare decisis* and as a rule of property, the court said in part:

> "It is further to be remarked that it is not the reason which a court gives for its decision which constitutes estoppel, but the thing it adjudges. * * * The property adjudged by a court to a litigant is his thenceforward under the doctrine of *res judicata* as a rule of property * * *; but the reasons which the court may give for the decision are thereafter simply pursuasive under he doctrine of *stare decisis*, and not in themselves to be invoked as the estoppel." (60 L. R. A. 85.)
>
> "But it is said, if the Lambert case (apparently of as much binding force on the Mississippi court as should be attached to the Parcher case here) is not *res judicata* it should control this case under the doctrine of *stare decisis*. There is one view of the Lambert case which authorizes the appeal to the doctrine of *stare decisis*. It did distinctly decide that what occurred between these companies was merger, and not consolidation, and that no new corporation was created thereby. * * * It did not decide, of course, * * * whether Section 180 of the Constitution of 1890 would have cut off the exemption had there been a consolidation creating a new corporation. Holding that it was a case of mere merger, the court very naturally held that Section 181 of the Constitution of 1890 had no effect on the exemption claimed in that view. The court most emphatically did not decide that, had there been a consolidation resulting in the creation of a new corporation after the Constitution of 1890 went into effect, such new cor-

poration could claim that an exemption belonging to one of its constituents prior to that Constitution, as the property of the absorbed company alone, was continued. * * * (This is the situation in this case.) There is no process of interpretation by which the decision in the Lambert case can be so distorted as to mean any such thing. * * * It was correct, in fact, to say that the exemption * * * passed by virtue of the word immunities * * * provided always that the exemption was legal in its origin, the validity of which was not contested but conceded in the Lambert case, but which was clearly invalid, as we shall show later in this opinion. * * * We have most carefully considered the Lambert case. Giving all due weight to the doctrine of *stare decisis*, and as to the two propositions that what occurred here was merger and not consolidation creating a new corporation, and that the exemption, * * * passed * * * even in the view of merger, under the legislation alone, *we hereby expressly overrule the Lambert case. Exemptions, where proper, should be expressly granted, not stealthily referenced in.*" (60 L. R. A. 88-90.)

"It is further clear that the constitutionality * * * of a legislative grant of exemption to private corporations * * * was not argued, considered or decided in Mississippi Mills v. Cook, but was conceded by the attorney general and the judges who wrote the majority opinions." (Likewise the incapacity of any corporation organized or coming into the State since 1858 to take and enjoy an irrepealable contract right similar to that here claimed has never been 'argued, considered or decided' in any case.)" (60 L. R. A. 94.)

"Subtlety and refinement and astuteness are not admissible to explain away an expression of the sovereign will. * * * The framers of the Constitution and the people who adopted it must be understood to have intended the

CHICAGO GREAT WESTERN RAILWAY COMPANY *v.* STATE OF MINNESOTA.

ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

No. 377. Argued November 8, 1909.—Decided February 21, 1910.

On the authority of *Great Northern Railway Company* v. *Minnesota*, *ante*, p. 206, held that:

As against the plaintiff in error, the act of Minnesota of 1903, requiring all railroad companies to pay a tax equal to four per cent of its gross earnings, is not an unconstitutional impairment of a legislative contract created by an act passed in 1856 imposing a tax of two per cent on a railroad company whose franchise was transferred to plaintiff in error.

The judgment of the state court in which it was held that the legislative contract of exemption from taxation in favor of a railroad company which was under consideration did not pass unimpaired to another corporation acquiring the franchises of the former, and constitute an irrepealable contract so that the rate of taxation could not be subsequently altered by legislative enactment, affirmed.

106 Minnesota, 290, affirmed.

THIS suit, like that of the *Great Northern Railway Company* v. *Minnesota*, just decided, *ante*, p. 206, involves the constitutionality, as applied to the plaintiff in error, of Chapter 253, General Laws of Minnesota of 1903, requiring every railroad company owning or operating any line of railway in that State to pay an annual tax, commencing with 1905, equal to *four* per cent of the gross earnings derived from the operation of such line within the State.

The gross earnings received by the defendant company, during the year 1905, amounted to $1,248,890.93, four per cent of which is $49,959.24. The State alleges that the defendant refused to pay and has paid only $24,979.62—leaving a balance of $24,979.62, for which amount the State asked judgment.

The court of original jurisdiction sustained the contention of the company that it was liable only to a sum equal to *two* per cent of its gross earnings and gave judgment for the defendant.

That court was of opinion that a certain statute of the Territory of Minnesota, approved March 1st, 1856 (Laws of 1856, c. 47), constituted a valid contract between the Territory and State of Minnesota, on one side, and the Minnesota and Northwestern Railroad Company, on the other, and fixed the lawful rate of taxation to be paid by that company at two per cent of its gross earnings; that said contract was never forfeited or lost by the company, but was transferred and passed, first to the Chicago, St. Paul and Kansas City Railway, and subsequently to the defendant herein; and that the statute of 1903, fixing the tax at four per cent of the company's gross earnings, was unconstitutional when applied to the defendant herein.

The judgment was reversed by the Supreme Court of Minnesota, with directions to enter judgment in favor of the State for the full amount stated in its complaint. 106 Minnesota, 290, 300.

The facts and issues are so fully and accurately set forth by the Supreme Court of Minnesota that we take from its opinion the following statement of the case: "This action, like that of *State* v. *Great Northern Company, infra*, p. 303, 119 N. W. Rep. 202, filed herewith, involves the validity of chapter 253, p. 375, General Laws, 1903, increasing the rate of the gross earnings tax upon railroad companies in this State to 4%. As in the *Great Northern case*, defendant asserts an irrepealable contract, under which it claims the right forever to discharge its tax liability by the payment of a 2% rate. The fixed rate claimed by the Great Northern Company was 3%. The determination of the case involves, as in the other case, the construction of an old Territorial railroad charter, the facts with reference to which are as follows:

"By c. 47, p. 121, Territorial Laws 1854, the Minnesota and

Northwestern Railroad Company was duly incorporated and authorized to construct a railroad within the limits of the Territory, the line of which road in a general way was therein designated. The act was accepted by the persons named as incorporators, but no effort was made by them to construct the road. By c. 58, p. 148, Laws of 1855, the act incorporating the company was amended by adding thereto, among other things, a provision requiring the company to construct and equip fifty miles of its road within three years after the passage of the amendment, and the entire line within six years, in default of which, the act provided, the charter of the company and all grants and rights thereby conferred 'shall cease and be void.' This act also contained a clause reserving to the legislature the right of amendment after the expiration of twenty years. In the original charter, and also in the amendment just mentioned, the company was required to pay into the treasury of the Territory or future State 7% of its net earnings. Whether this was intended as a substitute for taxes to be levied and collected in the usual way was not expressly stated. But in 1856, by c. 47 of the laws of that year, p. 76, the charter was again amended by imposing a 2% gross earnings tax in lieu of all other taxes. It is upon this act and the rate of taxation therein imposed that defendant relies in support of its defense. Defendant claims to have succeeded to all the rights of this old company, including the right to an irrepealable 2% tax contract. The facts leading up to this asserted succession are as follows: The old company, though fully organized, wholly failed to construct its railroad within the time prescribed by its charter and did nothing in that direction until some time in 1884, thirty years after its organization and twenty-four years after the time limited for the completion of the road. By this failure the company forfeited all its rights under the charter and all grants thereby conferred 'ceased and were void.' But by c. 83, p. 221, Special Laws 1883, the legislature of the State recognized the existence of the corporation and in effect waived the default in the construction of

the road by authorizing the consolidation of 'its stocks, franchises, rights and property with that of any other railroad company which will undertake the construction and operation of the railroad which the said Minnesota and Northwestern Railroad Company is authorized to construct and operate.' Sec. 2 of that act amended sec. 7 of the original charter by authorizing the construction of a line of road differing somewhat from that authorized by the old charter. The company was thus revived from its extended slumbers and proceeded to construct its road, and completed it some time in the year 1885. It thereafter operated the same until December of 1887, when it conveyed all its property 'contracts, rights, privileges and immunities' to the Chicago, St. Paul and Kansas City Railroad Company, a corporation created, organized and existing under the laws of the State of Iowa. Counsel for defendant treat this transfer as a consolidation of the two companies, authorized by the act of 1883. But as we read the documents by which the transfer was effected the transaction took the form of an absolute and unconditional sale by the Northwestern Company. The Kansas City Company took possession of the road and thereafter continued its operation until June, 1892, when it leased the line and all property connected therewith to the Chicago Great Western Railroad Company, defendant herein, a corporation organized and existing under the laws of the State of Illinois. Subsequently, in September, 1893, the Kansas City Company conveyed the property so leased, and all contracts, franchises and immunities, to its lessee, the Great Western Company, since which time the latter has continued in the operation of the road. Again, counsel claim that the conveyance by the Kansas City Company to defendant was a consolidation and authorized by law. This, however, is not important. The fact remains that the transaction resulted in an absolute transfer of the railroad property to defendant, and inasmuch as both those companies were foreign corporations, the laws of this State, would not control their dealings, and this State could neither authorize nor prohibit their consolidation.

But that question in no way controls the result in this case. The old Northwestern Company, after the completion of its road in 1885, commuted its taxes by the payment of the 2% rate imposed by the amendment of its charter in 1856, and the succeeding roads, including defendant, have paid the same rate.

"Defendant having refused to pay the rate prescribed by the statute under consideration, this action was brought to recover the amount of the increased rate. It is the contention of defendant that the terms of the old Northwestern charter fixing a two per cent rate constituted a contract between the company and the Territory or future State, irrevocable and irrepealable, to which defendant has succeeded, and that to enforce the new rate would impair the terms of the contract in violation of both the State and the Federal Constitutions. Defendant does not contend that the new rate is unreasonable or unfair or at all disproportionate to the rate paid by other taxpayers, but stands squarely upon its asserted legal right to a perpetual two per cent rate. The trial court sustained this view, ordered judgment for defendant, and the State appealed.

"The charter of this road has never heretofore been before the court for construction. No question has ever been raised relative to the rights of defendant or its predecessors upon the subject of taxation; and the construction of the old charter and amendatory acts, and right of the State to change the rate of taxation thereby imposed, are before us for the first time. Most of the questions involved were presented in the *Great Northern case*, where they were fully considered and disposed of adversely to the contentions of defendant. We there held, among other things, that the charter provisions of the old Minnesota and Pacific Company, upon which the Great Northern Company relied, did not constitute an irrepealable contract which passed unimpaired to the successors of that company; and further, that the gross earnings tax system first came into legal existence in this State by force of the consti-

tutional amendment of 1871 (Laws, 1871, p. 41, c. 18), and that it then became subject to the reserved right of the State to amend or repeal the same as public interests might justify or require. The language of the charter under consideration, in so far as it imposes this form of taxation, is for all practical purposes the same as that construed in the *Great Northern case*, and the conclusions there reached fully apply at bar, and we adopt and follow them."

Mr. George W. Peterson, with whom *Mr. George T. Simpson*, Attorney General of the State of Minnesota was on the brief, for defendant in error.

Mr. Frank B. Kellogg, *Mr. Cordenio A. Severance*, *Mr. Robert E. Olds* and *Mr. A. G. Briggs* for plaintiff in error, submitted.

MR. JUSTICE HARLAN, after making the foregoing statement, delivered the opinion of the court.

The rights of the plaintiff in error depend primarily upon the construction of the act incorporating the Minnesota and Northwestern Railroad Company, Territorial Laws, 1854, c. 47, the amendatory act of 1855, c. 58, the amendatory act of 1856, c. 47, and the act of 1883, Special Laws, c. 83. That act of 1856 imposed a two per cent gross earnings tax in lieu of all other taxes. The Supreme Court of the State observed that until the present case arose it had never had occasion to construe the charter of the original company, and the acts amendatory thereof, nor determine whether the State could change the rate of taxation thereby imposed. It was of opinion that the question of taxation, here involved, was substantially the same as the one involved in *Great Northern Railway Company* v. *State of Minnesota*. That court consequently adjudged, upon the authority of that case, that the defendant, as a successor in interest of the Minnesota and Northwestern Railroad

Company, could not claim the benefit of an irrepealable, unchangeable contract relating to taxation that passed or could, under the state constitution, have passed, unimpaired from the old company to a successor in interest, or that prevented the State from enacting the statute of 1903, chapter 253, General Laws of 1903. Without repeating what was said in the former case, we hold, upon the grounds set forth in the opinion in that case, that the state court rightly held that the State was not prevented by contract from passing the gross earnings tax law of 1903, and it properly reversed the judgment of the court of original jurisdiction, with directions to enter judgment in favor of the State for the amount claimed in its complaint. The judgment herein must be affirmed.

It is so ordered.

words employed in that sense most likely to arise from them on first reading them. This is the doctrine announced by Cooley and Story, and our construction of the meaning of Sections 13, to-wit, that it required the property of private corporations for pecuniary profit to be taxed just as, * * * the property of individuals, * * * is the identical construction placed upon the same words by the Supreme Court of the United State, and the Supreme Courts of Alabama, Arkansas, California, Florida and Iowa. *We prefer now to distinctly align ourselves with the Supreme Court of the United States on this important question, and overrule Mississippi Mills v. Cook.*" (60 L. R. A. 95-6.)

"It will thus be seen that on the particular holding of Mississippi Mills v. Cook, which we now overrule, this court stood absolutely alone, its decision in direct conflict with all the decisions we have just above cited. So much for the mere inaccuracy of that holding. We turn now to the propostion that the overruling of Mississippi Mills v. Cook * * * overturns a rule of property and destroys a vested right on which the railroad company has a right to rely. * * * There are some primary rules on the subject of *stare decisis* to which we shall first call attention. They are formulated by the Supreme Court of the United States as follows: (1) *The court is not bound by expressions in former decisions on points which were not contested.* Cross v. Burke, 146 U. S. 86, 36 L. Ed. 898. (2) The doctrine of *stare decisis* cannot be invoked in favor of decisions on former statutes which were merely similar to but not identical with the one under review. Wood v. Brady, 150 U. S. 20, 37 L. Ed. 982. * * * (3) It is expressly held that a decision that a statute constitutes a contract, and that an act repealing it is void, is not an estoppel to a subsequent decision holding that the former statute itself

is unconstitutional, and this is the exact case now before us. Boyd v. Alabama, 94 U. S. 645, 24 L. Ed. 302." (60 L. R. A. 100.)

"The question whether that exemption violated the Constitution of 1869 was not argued by counsel or considered by the court. These are the cases on which so much reliance has been placed to show a vested right,—a rule of property—and it is perfectly manifest that in none of them was it proper to have decided upon the constitutionality of this Section 21, unless in the Taylor case and the Lambert case, because in none of the other cases was that question involved and they could all have been decided without reference to that question; and consequently * * * they are not binding, under the doctrine of *stare decisis* even, on this court *in this case. And while the question of the constitutionality of said Section* 21 *was involved in the Taylor case and the Lambert case, the constitutionality of the exemption was conceded on all hands and not contested, and not having been contested, these cases, as held in Cross v. Burke*, 146 *U. S.* 82, 36 *L. Ed.* 896, *are of no force on us in this case, under the doctrine of stare decisis.*

"We have all proper respect for the doctrine of *stare decisis*, but it is a doctrine not inflexible, and departed from over and over by the wisest courts in proper cases. If the doctrine *stare decisis* can be disregarded in proper cases, where the question is one merely of property rights between individuals, *how much stronger is the reason for disregarding it when so to do results, as here, in restoring to a sovereign state the right to tax corporations and make them bear their just share of the burden of that government whose protection they so constantly and persistently invoke.* The distinction is not one of our own invention. It is well settled in law, and it was voiced in words which we can quote, by Chief Justice George in Lombard v. Lombard, 57 Miss. 177. He said:

> 'Speaking for myself alone, I would say that on constitutional questions where the former decisions refused a right reserved to individuals as against the power of the government or where it impaired the powers of the people or their representatives to prevent maladministration by their officers and agents or sanctioned an alienation by the legislature of powers conferred for the public good, I should feel little hesitation in departing from it, when satisfied of its uncorrectness.'"

In a subsequent case between the same parties, Yazoo & M. V. R. Co. v. Adams, 81 Miss. 90, 32 South. 937, the railroad company again defended upon the ground that the former decisions of the court constituted a rule of property. With respect to this claim the court said:

> "Courts can only decide what is the law, as declared by the constitution or enacted by the legislature. The application of the law cannot vary, however meritorious the particular case may appear. The property in controversy here is liable for the taxes for the years claimed, unless relieved therefrom by the operation of the rule of property as it existed at the time the appellants became owners of it,—so operating as to create an estoppel upon the state. A rule of property is a settled legal principle governing the ownership and devolution of property. This principle can be settled only by the Supreme Court of the state, and its utterances, in cases pending before it involving the title of property, construing statutes or constitutional provisions, *have the effect of establishing a rule of property to the extent only that the particular statute or constitutional provision was in that case involved, or necessarily considered and determined by the court in the case then pending before it.*"

It is because, outside of the Stearns case, the question of an irrepealable contract was not necessarily involved in any decision of this court, and because in no case has the obvious legal incapacity of a corporation organized since the adoption of the Constitution been in any way considered or questioned, that we now insist that none of such decisions are in any way binding upon the decision of this case.

In *People v. McCreery*, 34 Cal. 432, the question under consideration was the validity of a law exempting property from taxation under a constitutional provision in these words:

> "Taxation shall be equal and uniform throughout the State. The property of this State shall be taxed in proportion to its value, to be ascertained as directed by law."

The law was held unconstitutional, the Court overruling *People v. Coleman*, 4 Cal. 46, and *High v. Schoomaker*, 22 Cal. 302, and saying with respect thereto:

> "For the learned justices who united in the decisions we have great respect; and we would readily and willingly yield to the authority of their decisions in cases where the construction of a constitutional provision is involved in doubt. But when the language of the Constitution is, as we find it in this section, clear and free from ambiguity or doubt, we must yield to the Constitution as the paramount authority."

Many of the dicta found in the decisions of the Supreme Court of Minnesota, which are claimed to

bear upon the issues in this case, are subject to the following rule:

> "It is a maxim not to be diregarded that general expressions in every opinion are to be taken in connection with the case in which these expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the Court is investigated with care and considered in its full extent. Other principles, which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."
>
> Cohens v. Virginia, 6 Wheaton, 399, 5 L. Ed. 290.

For an exemple of erroneous decisions set aside, even though claimed to constitute a rule of property, see

Remey v. Iowa Central Ry. Co., 89 N. W. 218.

The Court said, on page 222, that even though the old decisions did constitute a rule of property, they could not be too quickly overruled.

On the question whether by the former decisions of the Supreme Court of Minnesota, contract rights have accrued which are within the protection of the Federal Constitution, the following excerpt seems in point:

> "The defendant insists that his rights having been acquired when these decisions of the highest court of Kentucky were in full force, should be protected according to the law of the State as it was adjudged to be when those

rights attached. But is this court required to accept the principles announced by the state court as to the extent to which the contract clause of the Federal Constitution restricts the powers of the state legislatures? Clearly not. The defendant invokes the jurisdiction of this court upon the ground that the rights denied to him by the final judgment of the highest court of Kentucky, and which the state seeks to prevent him from exercising, were acquired under an agreement that constituted a contract within the meaning of the Federal Constitution. This contention is disputed by the State. So that the issue presented makes it necessary to enquire whether that which the defendant asserts to be a contract was a contract of the class to which the Constitution of the United States refers. This Court must determine—indeed, it cannot consistently with its duty refuse to determine—upon its own responsibility, in each case as it arises, whether that which a party seeks to have protected under the contract clause of the Constitution of the United States is a contract the obligation of which is protected by that instrument against hostile state legislation."

Douglas v. Kentucky, 168 U. S. 488, 501; cases cited.

Whether a railroad gross earnings tax can be increased from two to four per cent, has never been brought before the Supreme Court of Minnesota until in the case at bar. It would seem that this fact alone should exclude any rule of *stare decisis* or rule of property as a bar in the instant case.

If it be held that the Supreme Court of Minnesota in the case at bar has reversed the former decisions now relied on by the plaintiff in error,

then it is insisted that such course was necessary and proper in order to uphold constitutional provisions. In such cases there can be no choice between the erroneous decision and the mandates of the Constitution. Assuming that the analogy exists, attention is called to the decision of the Supreme Court of California in People v. McCreery, overruling People v. Coleman, and High v. Schoomaker, *supra;* and to the decision of the Supreme Court of Mississippi in Adams v. Yazoo Railway Co., overruling Mississippi Mills v. Cook, *supra;* and to the decision of the Court of Appeals of Kentucky in Citizens Saving Bank v. Owensboro, 19 Ky. L. Rep. 248 (affirmed 173 U. S. 636), overruling Bank Tax Cases, 97 Ky. 597.

In the Mississippi and Kentucky cases the setting aside of the former decisions was approved by the Supreme Court of the United States. In the latter case that court said (173 U. S. 648):

> "As we conclude that the decision (of the State court) in the Bank Tax Cases above cited, upon the question of contract, was not only in conflict with the settled adjudications of this court, but also inconsistent with sound principle, we will not adopt its conclusions."

Where the question is one of which the Supreme Court of the United States has appellate jurisdiction upon a writ of error to a state court, the decisions of the former upon the questions are binding upon the state tribunals and will be followed by them.

26 Am. & Eng. Ency. of Law, page 176. Cases cited.

That the decisions relied on by the plaintiff in error cannot constitute a rule of property will more fully appear on an analysis of said decisions, *in fra.*

VIII.

THE MINNESOTA CASES DO NOT CONSTITUTE A BAR AS A RULE OF PROPERTY OR OTHERWISE IN THE INSTANT CASE.

As a preliminary to the critical examination of the Minnesota cases as a bar to the present action and determinative thereof, it is well to note that mere dicta, expressions of opinion by the Court on matters the disposition of which was not required, create no estoppel.

Barney v. Winona, etc., Co., 117 U. S. 231.

When a point is not raised or considered on a former appeal, the appellate court has been held not bound.

Balch v. Haas (C. C. A.) 3 Fed. 977;
Pa. Co. v. Bond, 202 Ill. 995.

When a decision is considered to be antagonistic to the express provisions of the Constitution of the State, the doctrine of *stare decisis* cannot be invoked to sustain such decision.

Higgins v. Bordages, 88 Tex. 458 (53 Am. St. Rep. 770).

Where vital and important public or private rights are concerned, and the decisions regarding them are to have a direct and permanent influence in all future time, it becomes the duty as well as the right of the court to consider them carefully and to allow no previous error to continue if it can be corrected. The foundation of the rule of *stare decisis* was promulgated on the ground of public policy and it would be an egregious mistake to allow more harm than good to accrue from it.

26 Am. & Eng. Ency. of Law, page 184.

The weight of a judicial decision may depend in a considerable degree upon whether or not the point ruled upon was urged and discussed before the court.

Idem. page 170, cases cited.

It is not to be tolerated that the state should be forever debarred of its taxes by an erroneous decision.

Adams v. Yazoo Co., 60 L. R. A. 80.

(a) MINNESOTA CASES CHRONOLOGICALLY CONSIDERED.

Huff v. Winona & St. Peter R. R. Co., 11 Minn. 180 (Gil. 114).

This case, decided in 1866, involved but the one question whether the Winona and St. Peter Railroad Company was the same corporation as the Transit Railroad Company and therefore liable for the debts of the latter. The case depended upon the construction and effect, not of any territorial

charter, but of an act of the legislature approved March 10, 1862. It was held that the new company organized under that law was not the same corporation as the Transit Company and was not liable for its debts. This was the only question decided and the only one touched upon in the opinion. The question of an irrepealable contract was not presented or suggested and the judgment of the court in no way depended upon any question of that nature.

The Parcher Case, 14 Minn. 297 (Gil. 224).

Respecting said case the Supreme Court of Minnesota observes:

> "The Parcher case involved the right of the state to tax the land grant in addition to enforcing the earnings tax, and, while the court discussed at some length the contractual relations arising from the Minnesota and Pacific charter, it finally reached the pivotal question before it and held that the specific exemption of the land was valid and upon that conclusion based its decision. The result of that decision is in full harmony with the view that the exemption of specific property donated to the railroad company for a specific purpose attached to the land, and was not, like the earnings system, a personal privilege to the grantee."

(See Appendix).

State v. G. N. Ry. Co., 106 Minn. 333.

As a preliminary to the above, the Court had observed:

> "Two distinct provisions on the subject of taxation were embodied therein (the Charter),

the first provided for a gross earnings tax in lieu of all other taxes and assessments and, second, an exemption of the land grant until sold or contracted to be sold by the company."

(Idem, p. 323.)

And again:

"A distinction must not be overlooked, when considering the assignability of tax exemption between those imposing a commuted system in lieu of property taxes and those exempting specific property. In the former case the system does not attach to the corporation or concern thus taxed nor to any particular property, and necessarily is personal and not assignable. But where, as in the case at bar, specific land is granted to a railroad company to aid in the construction of a railroad, and is specifically exempted from taxation until sold by the company, and the company accepts in consideration of the exemption, the exemption attaches to and follows the land. State v. New Jersey v. Wilson, 7 Cranch, 164, 3 L. Ed. 303; State v. Hicks, 9 Yerg. (Tenn.) 486, 30 Am. Dec. 423; International v. State, 75 Tex. 356, 12 S. W. 685. In such case, as we have frequently held, as will be shown later, the exemption is appurtenant to and passes with the land to a succeeding corporation assuming the burden attached to it." (Idem, p. 326.)

The Parcher case was decided in 1869. We call the attention of the Court to the complaint. (Trans. Great Northern case, p. 252.) The case was decided upon the demurrer to the complaint and went to final judgment thereon.

In view of the fact that this decision is claimed to have established a rule of property to the effect that the railroad company has an irrepealable con-

tract right to the three per cent. gross earnings tax and that the same was appurtenant to the railroads, the following facts disclosed by the complaint are worthy of notice:

The facts referred to are these:

(1) Section 18 of the Charter of 1857 is neither referred to as, nor claimed to be a contract or a grant of the alleged exemption of the lands from taxation. (2) The Act of March 4, 1865, is the only law which is referred to or claimed as the grant of the alleged exemption. (Trans. idem p. 262.) (3) There is no suggestion anywhere in the complaint that the exemption was enjoyed by virtue of any contract. (4) It is not claimed that the exemption was perpetual so as to be beyond the power of the legislature to amend or repeal. (5) The only claim was that, under the laws of the state, the lands were exempt from taxation until sold or conveyed.

The prayer of the complaint was that the defendants, the auditor and treasurer of the county, should be enjoined from taking any steps to tax the lands, thereby clouding the title. No other relief was asked. The writ of injunction as prayed for was the only relief ever granted and the judgment of the court, aside from finding the allegations of the complaint true, went only to the extent of declaring the lands in question exempt from taxation (Trans. idem, p. 263). It is thus seen that the examination of the complaint in the Parcher case is all that is necessary to demonstrate the

utter lack of foundation for the claim now made that it constitutes a rule of property, binding upon the state, as against the right of the state to assert that there is no irrepealable contract right vested in the plaintiff in error, which is protected from impairment by the contract clause of the Federal Constitution.

The several allegations of the complaint went rather to the establishment of the corporate capacity of the First Division Company and its right to bring suit.

Finally the points in judgment are—"First. That upon the allegations of the complaint, 'First Division of the St. Paul and Pacific Railroad Company' is a corporation and authorized to sue and be sued as such. Second. That upon the same allegations, it is entitled to hold such of the lands granted by the United States to the territory by Act of Congress of March 3, 1857, as it has become vested with under the laws and proceedings hereinbefore referred to, exempt from taxation, until the same are sold and conveyed by it." First Div. Co. v. Parcher, 14 Minn. 232.

State v. Winona & St. P. R. R. Co., 21 Minn. 315. Decided January 11, 1875:

"The case of State v. Ry. Co., 21 Minn. 315, again presented the taxability of the land grant, and the decision was placed squarely upon the clause of the charter of May 22, 1857, which is therein quoted, that the lands granted by the state 'shall be and are exempted from

all taxation until the same shall have been sold and conveyed.' The other cases also involved solely this specific exemption. The question whether the provisions of the charter respecting the gross earnings tax constituted an irrevocable contract was not before the court in either of the older cases and a consideration thereof was wholly unnecessary to the result reached. Such appears to have been the view of Mr. Justice White (with whom concurred Justices Harlan, Gray and McKenna), in Stearns v. State, 179 U. S. *supra*, for he there said: 'Nor does it seem to me that the decisions of the Minnesota courts, which are referred to as showing that under the Constitution of that state it was competent for the legislature to enact a gross receipt tax law and provide for its continuance by an irrepealable contract, sustain the proposition deduced from them. In no single one of these cases was the question of irrepealable contract presented, considered, or decided in any form.'

What was said in the opinion in State v. Ry. Co., 21 Minn. 315, in reference to the case of Trask v. McGuire, *supra*, should be given no greater force or effect than the decision of a question now claimed to have been determined but which was not before the court."

(See Appendix).

First Div. Co. v. City of St. Paul, 21 Minn. 526. Decided May 14, 1875.

This case involved the liability of the railroad company to pay assessments for local improvements attempted to be imposed upon certain of its lands in the City of St. Paul. The company's claim is thus stated on page 527:

"The first division of the St. Paul and Pacific R. R. Co. appeared in court claiming that

it was the owner of the land, that it occupied and used the same for the purposes of its railroad, that the land formed no part of the company's land grant, that the company had paid into the state treasury all sums required by law in lieu of taxes and assessments, and that the land was therefor exempt from all taxes and assessments whatsoever, including the assessment then sought to be enforced against it."

Said cause came to the Supreme Court by *certiorari* to review the action of the District Court. The only question before the court was the meaning of the language contained in the Territorial Charter, to-wit: "The said company shall be forever exempt from all assessments and taxes whatever." The Court held this included local assessments.

Chicago, M. & St. P. Ry. Co. v. Pfaender, 23 Minn. 217.

"The Pfaender case involved solely the question whether the railroad was liable for a two or a three per cent. tax on its earnings."

State v. G. N. Ry Co. (Idem, p. 333.)

The question which the decision turned upon was thus stated by Mr. Justice Cornell:

"It is conceded that the point presented for decision in this case depends entirely upon the true meaning and construction of the fourth and fifth proviso of Section one of the Act of March 2, 1865, entitled 'An Act to aid and facilitate the completion of the St. Paul and Pacific Railroad and its branches.'
Sp. Laws, 1865, C. 6."

Because the line was one of those authorized by the Minnesota and Pacific Charter and therefore within the intended scope of the Act of March 2, 1865, it was held that the defendant was liable to the three per cent. tax.

The second paragraph of the opinion is in part as follows:

> "It is also *admitted* that these provisos were enacted as amendatory of section 18 of the original charter."

Attention is called to this because, it being *admitted* that the Act of March 2, 1865, was amendatory to the original charter, this language so used by the court is in no way binding now as against a holding that the new law was a repeal of, and substitute for, section 18 of the charter of 1857.

In view of the narrow nature of the issue, as defined by Mr. Justice Cornell in the language above quoted, we submit that the language found on page 224, to the effect that the immunity was not simply a personal privilege but a right appurtenant to its lines or road, is entirely *obiter*.

There was no question in the case as to the constitutionality of the Laws of 1865. The only question was as to their "true meanings and construction."

City of St. Paul v. St. Paul and Sioux City Railway Company, 23 Minn. 469.

Again in this case, decided March 30, 1877, the question was as to whether certain lots belonging

to the defendant and used by it for railroad purposes were liable to assessments for local improvements. The judgment was to the effect that the land in question was exempt from such assessments. The question again was as to the *construction and meaning* of the statute.

Like the case of the First Division Company v. St. Paul, *supra*, it was not necessary for the court to go beyond the question of statutory construction in order to reach its decision. Nothing else was necessarily involved. Therefore the reference on page 473 to the Parcher case, to the effect that the First Division Company and *its successors* were exempted from local assessments is clearly *obiter*.

County of Nobles v. Sioux City & St. P. R. Co., 26 Minn. 294.

This case was decided December 5, 1879, and was a proceeding for the collection of taxes assessed on the defendant's lands. It was claimed on behalf of the County that the exemption from the taxation of the lands in the ordinary way had been lost by the transfer of an unconstructed portion of the line and the land grant pertaining thereto, the purchasing company to construct and equip such portion of the line.

The exemption of the lands while belonging to the original company was not questioned. It was only claimed that the exemption was lost by the arrangement resulting in the transfer to the defendant. It was held that the transfer was not a

sale and conveyance within the meaning of the Act of May 22, 1857, exempting the lands from taxation "until sold and conveyed."

In support of the argument contained in part VI, supra, to the effect that our Court has never been of the opinion that the exemption of the lands from ordinary taxation was intended to have been vested in any company which had not earned the same and had not constructed a part of the road to which the granted lands were appurtenant, we call the court's attention to the following language of the Court in this case, found in 26 Minn. 297-8:

> "The general purpose of that act, as also of the Act of March 4, 1864, was to secure the construction of the road with the lands granted by the act of congress for that purpose. It was contemplated that the road, if constructed at all, would from necessity be constructed mainly, and perhaps for a time maintained, from the proceeds of sales of the lands; that the lands would not produce any revenue except from sales, that it might be a considerable time before they could be sold, and that if in the meantime they should, by being subject to assessment and taxation, be a source of expense to any company holding them, the company to which the lands were offered would be less likely to accept the grant, and undertake the construction of the road. As an inducement to the company to enter upon the enterprise, the exemption from taxation was created.
>
> All the acts of the legislature, from first to last, show it was intended that this exemption should exist in favor of any company which, in consideration of the land grant, should assume the construction and maintenance of the line to which it was applicable. It is so expressed in the Act of May 22, 1857, in respect to the Root River Valley & Southern Minne-

sota Company, and in the Act of March 4, 1864, in respect to the Minnesota Valley Company; and in the Act of 1869 the authority given to the latter company to transfer to the Sioux City & St. Paul Company, not the lands merely, but 'so much of the line and land grant,' implies that the company so authorized might pass to the other all the benefits, together with the burdens, of the grant of land made by the State."

State v. St. Paul, Minneapolis and Manitoba Railway Company, 30 Minn. 311.

This decision was handed down on March 19, 1883, and the syllabus correctly and fully indicates the only question which was considered or decided, and is as follows:

"The 'gross earnings' upon which three per centum is to be paid to the state in lieu of taxes, under the charter of this defendant (Laws 1857, Ex. Sess. C1, Subc. 1), do not include the compensation paid to it by another company for the right to run trains over its lines."

The action was commenced by the state to recover the three per cent. tax on $40,000.00 which the defendant received from the Northern Pacific Railroad Company as a rental for the use of that portion of its road from Sauk Rapids to St. Paul and from St. Cloud to East St. Cloud. The case was submitted to the District Court on stipulated facts whereby it was *admitted* that the defendant had paid as taxes, *under the law* of 1857, three per centum upon its gross earnings, not including the $40,000.00 above referred to. Judgment was en-

tered for the defendant and on appeal by the plaintiff the same was affirmed. The narrowness of the issue and the consequent restricted nature of the judgment are shown by the opening paragraph of the opinion:

> "The only question in this case is, does the $40,000.00 per annum which the Northern Pacific Railroad Company pays to defendant for the right to run its trains over defendant's lines from Sauk Rapids to St. Paul, and from St. Cloud to East St. Cloud, and from Minneapolis (west) to East Minneapolis, come within the term of 'gross earnings' upon which, according to the act from which the defendant derives its existence three per centum is to be paid in lieu of taxes?"

Inasmuch as it was *admitted* that the defendant was paying taxes under the charter of 1857, this decision is no bar to this Court's holding that all taxes have been paid by the defendant and its predecessors under the Act of March 2, 1865.

The question involved only the construction of certain language in the charter, under which it was admitted that the taxes were payable. This law referred to "all receipts and expenditures on account of the operation of said railroads" as the basis of the accounting for purposes of taxation. Construing this language, the court held that the receipts from operation were the only ones to be taken into account between the company and the State, and that the exaction of three per cent. upon the rent and also upon the receipts by the tenant earned by operating the railroad "would be, to the extent of the rent, in the nature of double taxation,

or rather of exacting twice the commutation for taxes on the same property."

Having stated fully the conclusion of the court, and the reasons therefor, the learned Chief Justice lapsed into the following generalization:

> "Leasing or selling the railroad cannot affect the rights of the state. Into whose hands soever the railroad may pass, and whoever may receive the gross earnings, the obligation to pay and the right of the state to receive the three per centum on such gross earnings are unimpaired. Such earnings still furnish the measure of such obligation and right."

The quoted excerpt is a favorite text of the plaintiff in error. An examination of the opinion shows, however, that said excerpt is entirely *obiter*. It had no connection with the decision which was reached, which was not to the effect that the leasing company was obligated to pay the taxes, but that the lessor company did not incur any taxes on account of the rentals received by it.

Attention is also called to the fact that the Manitoba Company in said case was paying taxes under the Act of March 2, 1865, which act in truth and in fact was the act the construction of which should have been before the court, and which latter act did not contain the language "all receipts and expenditures *on account of the operation* of said railroads" on which specific language the decision seemed to turn.

State v. Northern Pacific Railroad Company, 32 Minn. 294.

This is the sequel to the case last referred to, and was decided the next year (July 18, 1884). In the case against the Manitoba Company the State sought to recover the gross earnings tax on the rental received by the lessor. In this case the effort was to recover three per cent. of the defendant's gross earnings for the year 1881 derived from its operation, as lessee, of the line between St. Paul and St. Cloud, that being the same line covered by the lease or contract referred to in the last case. "The defendant, in its answer, denied that it had any possession or control of the line, and relied on Sp. Laws 1870, c. 65."

The District Court ordered judgment for the plaintiff and the same was affirmed on appeal.

In this case it was again assumed that the Minnesota and Pacific Charter was the only law which governed as to taxation, the Act of March 2, 1865, being entirely overlooked. The opinion does not contain any suggestion that the latter act was in any way presented to, or considered by, the Court.

It was held that the obligation imposed by the Minnesota and Pacific Charter operated to compel the Northern Pacific Railroad Company to pay the three per cent. tax upon its gross earnings derived from the operation of the road in question, which was a part of the Minnesota and Pacific charter lines. It was also held that there was nothing in Chapter 65 of the Special Laws of 1870 which would operate to exempt the defendant from such

obligation. In so far as it went beyond the consideration of the effect of this Special Law it seems that the opinion must be considered as *obiter* for the reason that the issue raised by the defendant was simply (as stated by the Court on page 296),

> "That no such estate or interest passed to it by the contract * * * and that if the contract did pass such estate or interest, it was exempted, without the obligation to pay the percentage, by Sp. Laws 1870, c. 65, sec. 1."

This statement of the defense makes it apparent that there were but two questions presented, one as to the meaning and effect of the contract, and the other as to the meaning and effect of the Special Law referred to.

There is absolutely no suggestion in the opinion, and it does not appear therefrom that it was suggested by either of the litigants, that either of the contracting companies had any contract right in the Minnesota and Pacific Charter or under any other gross earnings law.

The Stevens County Case, 36 Minn. 467.

Decided March 2, 1887, involved simply,

> "The question of the taxability of the estate or interest which the St. Paul, Minneapolis and Manitoba Railroad Company had in its lands after the same had been contracted to be sold, but before payment of the purchase price, or the performance of the contract conditions so as to entitle the purchaser to a conveyance."

As we have heretofore indicated, the case was heard on the answer of the company which was

stipulated to be true. The Court was thereby prevented from considering whether or not the exemption assumed to exist in favor of the First Division Company ever passed to the Manitoba Company. For the same reason it did not consider the constitutionality of Chapter 412, Special Laws 1881, whereby it was attempted to confirm the organization and purchase of the Manitoba Company. Of course for the same reason it was unnecessary to consider the constitutionality of Chapter 30 of the General Laws of 1876, under which that company was organized.

The reference on page 471 to the contract right of the original company is manifestly *obiter*, for the question before the Court was not to the nature of the law as a contract or otherwise, but as to its construction with respect to, and its effect upon, the taxation of the lands in question. The comment at the bottom of page 471 and on page 472 with respect to the constitutionality of laws passed by the state legislature providing for gross earnings taxation, and to the effect that such laws were valid, has since been disapproved, it having been decided that the gross earnings laws were invalid until ratified by the constitutional amendment of 1871.

The Stevens County case has been extensively referred to and quoted from in the briefs, *supra*, and needs no further analysis. The distinguishing feature of it is that, even though they had been involved, the Court was prevented by the stipulation of facts from considering the questions which are

being urged upon the Court's attention in the present litigation.

County of Todd v. St. Paul, Minneapolis & Manitoba Railway Company, 38 Minn. 163.

Decided February 1, 1888, this case was certified to the Supreme Court in proceedings to enforce the payment of taxes on real estate owned by the defendant but not being a part of its land grant nor used directly for railroad purposes. The question was simply as to whether or not in that situation the lands were exempt from ordinary taxation. It was *admitted* that the defendant had succeeded to the rights, franchises and immunities of the Minnesota and Pacific Railroad Company.

> "As to this," says the Court, (page 164), "No question is raised; nor that the Charter of the Minnesota and Pacific Company is to be referred to as defining the exemption to which the St. Paul, Minneapolis and Manitoba Company is entitled."

This case is a good illustration of how easily and how frequently both the legal department of the State and the District and Supreme Courts have overlooked the Acts of March 2 and March 4, 1865, with respect to gross earnings taxation.

A statement of the issue shows that the only question for decision was as to the construction and effect of whatever law was applicable, and it was admitted that such law was found in the Minnesota and Pacific Charter. Applying the rule of strict construction, the Court held that the lands

were not within the exemption from ordinary taxation. No question of contract, irrepealable or otherwise, was before the Court.

State ex rel. Marr v. Luther, 56 Minn. 156.

Decided January 5, 1894, this case also involved the question of whether granted lands were exempt from ordinary taxation, in the absence of any law expressly attempting to subject them to such taxation. The opinion of the Court discusses two questions, the first of which was one of repeal. It was held that the act of March 3, 1865, repealed the act enacted on February 23. In the discussion of this point the Court used language which so fully supports our contention that the Act of March 2, 1865, was a complete substitute for, and therefore a repeal of, Section 18 of the Minnesota and Pacific Charter relating to taxation, that we again quote it here. The language referred to is as follows:

> "It seems to us perfectly apparent that, as respects taxation, the second act was intended as a revision of or substitute for the first, and to prescribe the only rule on the subject. The second act covers all the ground covered by the first, making various changes, some in favor of the State, and others in favor of the company, although, as usual in those days, mostly to the latter."

This language fits the act of March 2, 1865, in its relationship to the Minnesota and Pacific Charter and it must follow that the former must be considered as having repealed the latter and as be-

ing a new and substituted arrangement.

The next question discussed in the Luther case is the Constitutional Amendment of 1871, and it was held that, assuming the gross earnings laws passed prior thereto to have been unconstitutional, the same were validated by the amendment. The acts in question were held constitutional and it was added that the lands of the St. Paul and Duluth Railroad were exempt from taxation.

In the course of the opinion Mr. Justice Mitchell used language to the effect that there was no remedy against whatever mistake had been made by the State in making "injudicious contracts" (page 161). This *obiter* remark was the occasion for the note added to the opinion upon the denial of the application for a reargument wherein it was said that the remark referred to was not intended to express or intimate any opinion as to whether the laws in question constituted contracts which could not be repealed or amended.

State ex rel. Marr v. Stearns, 72 Minn. 200.

Decided May 11, 1898, this case has already been referred to at such length that no additional comment is necessary here. We take the opportunity, however, of again emphasizing the fact that it was the first case where this Court was ever confronted with the question of whether or not the legislature had the power to amend or repeal a gross earnings tax law, State or Territorial. There was no proper occasion for passing upon that question, or

intimating any opinion with respect thereto until the question of the constitutionality of the Anderson Law, attempting to subject the granted lands to ordinary taxation, was presented to the Court in this case.

The Traverse County Case, 73 Minn. 417.

This decision was handed down July 22, 1898, and has also been extensively referred to and quoted from. All we care to do here is to again direct attention to the fact that, on page 426, in the very paragraph in which reference is made to the effect of the legislation, and decisions with respect thereto, it is expressly stated that

> *"The question whether the legislation on the subject involves the elements of a contract between the defendant or its predecessors and the State is not necessarily involved, and need not now be considered."*

If that question was not involved in the Traverse County case, it could not have been involved in any other case where the question was as to the liability of granted lands to ordinary *ad valorem* taxation in the absence of any law expressly attempting to subject the same thereto. In support of our assertion that the question of contract was not involved in any of the cases upon which the plaintiff in error seems to place so much reliance, it is impossible to find any weightier authority than the foregoing solemn assertion of the Minnesota Court, made by it in restricting the scope of its decision in

the Traverse County Case. That solemn assertion, made in what was really the last of the decisions upon the subject in hand, applies equally to every other case involving the question of the taxation of the granted lands prior to the passage of the Anderson Law. It is a solemn statement that the question of contract was not involved and not necessary to be decided in any of the cases, except the Stearns case.

State v. Duluth & Iron Range Ry. Co., 77 Minn. 433.

Decided October 23, 1899, this case involved questions similar to those in the Stearns case. The Anderson Law, Chapter 168, G. L. 1895, was upheld and the Court declared that the lands in question were taxable.

> "In view of this situation, it cannot be urged with any force that the earlier decisions of the court rightly adjudicated or determined the question of the power of the state to change the rate. The question not being involved in the prior cases, former expressions of the Court were *obiter* and of no binding force or effect as final adjudications. What was said therein is confessedly at variance with the conclusions of nearly all other courts, State and Federal, and, inasmuch as the precise question was not necessarily there before the court, we are fully justified in declining to treat them as final."
>
> State v. G. N. Ry. Co., p. 334.
>
> (See Appendix).

(b) THESE DECISIONS DO NOT CONSTITUTE ANY RULE OF PROPERTY WITH RESPECT TO THE ALLEGED CONTRACT RIGHT OR THE SUCCESSION THERETO.

Having examined the facts of each case and stated the issues, it is now apparent that:

1. As stated by four of the Justices of the Supreme Court of the United States in the Stearns case (179 U. S. 223, 45 L. Ed. 162):

> "In no single one of these cases was the question of irrepealable contract presented, considered or decided in any form."

2. Aside from the two cases involving the Anderson Law of 1895 (State ex rel. Marr v. Stearns and State v. Duluth & Iron Range Ry. Co., *supra*), the question *was not as to the power of the legislature to enact a new law, but as to the meaning and effect of old laws*, e. g. whether they exempted the granted lands from ordinary taxation (Parcher, Stevens County & Traverse County Cases, etc.); or whether taxable "gross earnings" included rentals (State v. St. Paul, Minneapolis & Manitoba Ry. Co.); or whether the lands were exempt from assessments for local improvements (First Division Co. v. City of St. Paul and City of St. Paul v. St. Paul & Sioux City Ry. Co.); or whether a lessee having running rights was liable to pay the tax on its gross earnings derived from the operation of the leased line (State v. N. P. Ry. Co.), and so on.

3. In no case was the legal incapacity of a new corporation to take a contract immunity, if one

ever existed, suggested to, considered, or passed upon by the Court.

4. In those cases where the so-called "immunity" was said not to be a personal privilege, but appurtenant to the lands (e. g. Stevens County and Traverse County Cases), the judgment was not to the effect that it was a contract right. Hence the legal incapacity of the grantee company was immaterial. But, if it was material, legal capacity in the transferee was assumed or conceded to exist. *The point was not contested.*

All that remains is to apply the rules which govern the application of the maxim, "*Stare decisis et non quieta movere.*" These rules are as follows:

1. A decision construing a statute, determining its meaning and giving it effect as an irrepealable contract, is not a bar to a subsequent decision that such *statute is unconstitutional.*

Boyd v. Alabama, 94 U. S. 645, 24 L. Ed. 302.

2. If, in a prior action, a different question from that actually determined might have arisen and been litigated, such possible question is not to be excluded from consideration in a second action, even though it be between the same parties.

Keokuk & Western Ry. Co. v. Missouri, 152 U. S. 301, 38 L. Ed. 450;

Cromwell v. Sac County, 94 U. S. 351, 24 L. Ed. 195.

3. No court is bound by expressions in former opinions on points not contested therein.

Cross v. Burke, 146 U. S. 82, 36 L. Ed. 896.

4. The doctrine of *stare decisis* cannot be invoked in favor of decisions on former statutes which were merely similar to, but not identical with, the one under review.

Wood v. Brady, 150 U. S. 20, 37 L. Ed. 981.

5. No unambiguous mandate of the Constitution can be overcome by the erroneous decisions of the courts.

Adams v. Yazoo Co., 77 Miss. 194, 60 L. R. A. 35;

Lombard v. Lombard, 57 Miss. 177;

People v. McCreery, 34 Cal. 432.

6. The reasons given by a court for its decisions do not constitute an estoppel. They are thereafter merely persuasive under the doctrine of *stare decisis*.

Adams v. Yazoo Co., *supra*.

The application of these rules leads to the conclusion that the prior decisions of the Supreme Court of Minnesota are no bar to the instant case. The question is whether there is any irrepealable contract, vested in the plaintiff in error, the protection of which, under the contract clause of the Federal Constitution, cannot be impaired by Chapter 253, G. L. 1905, which is alleged to be hostile legislation. The decision of this question must be governed by the established principles of constitutional law as the same have been settled by the decisions of the United States Supreme Court.

IX.

THE RESERVATION OF THE POWER TO AMEND THE CHARTER OF PLAINTIFF-IN-ERROR, INVOLVING SECTION 9, CHAPTER 58, LAWS 1855.

This portion of the brief involves the statutory reservation by the State, of the power to amend the charter originally granted to the Minnesota & Northwestern Railroad Company, the charter rights of which company are now claimed by the plaintiff-in-error.

If the power in question be reserved by the charter in the State, the issue in this case, apart from the reasons heretofore submitted, must be resolved in favor of the State, and the plaintiff-in-error be held amenable to the provisions of Chapter 253, Laws 1903.

The original charter of the Minnesota & Northwestern Railroad Company, granted March 4, 1854, was re-enacted by Section 7 of Chapter 58, Laws 1855, which section reads as follows:

> "The act entitled 'An act to incorporate the Minnesota & Northwestern Railroad Company,' is hereby re-enacted, subject to the amendments and provisions herein contained."

Section 8 of said Chapter 58 declares the act a public act, and reads as follows:

> "This act shall be deemed a public act, and shall be in force from and after its passage."

Section 9 of said Chapter was a reservation of power, and reads as follows:

> "The legislature of the Territory or future State of Minnesota, may repeal, amend or modify this act, and the act to which this is amendatory, from and after the expiration of twenty years from the date of the passage of this act. Provided, that compensation be made to said company for all damages sustained thereby."

The act was passed by the House of Representatives February 16, 1855, and by the Council February 17, 1855. The plaintiff-in-error stands upon the act in question as a part of its charter rights.

Eliminating for the present, the proviso clause, it must be conceded that Section 9 of Chapter 58, *supra*, is a reservation of power in the Territory or future State, to repeal, amend or modify that charter of the plaintiff-in-error, after the expiration of the limitation of twenty years as set out in the statute.

THE DARTMOUTH COLLEGE CASE AND THE RESERVATION OF LEGISLATIVE POWER CONSEQUENT ON SAID DECISION.

Digression is made at this point to note that following the decision of the Darthmouth College Case, reservation of the power to amend, repeal or modify charters became the rule in legislative grants.

> Darthmouth College Trustees v. Woodward, 17 U. S. (4 Wheat. 541), 4 L. Ed. 629.

(a) THE POWER TO ALTER OR REPEAL A CHARTER MAY BE RESERVED BY THE CONSTITUTION OF THE STATE GRANTING THE CHARTER.

Olcott v. Fond du Lac County, 16 Wall. 678, 21 L. Ed. 382.

Attorney General v. C. & N. W. Ry., 35 Wis. 576.

West Wisconsin Ry. Co. v. Trempealeau County, 35 Wis. 271.

By Section 47 of Article III of the Constitution of 1851 of Maryland, it was provided that:

> "Corporations may be formed under general laws, but shall not be created by special act except for municipal purposes, and in cases where in the judgment of the legislature, the object of the corporation cannot be attained under general laws. All laws and special acts pursuant to this section may be altered from time to time, or repealed." * * *

Under and by virtue of the above constitutional provision it was held:

> "1st. That this provision was designed to be, and as far as any act could make it so, was, a clear and explicit limitation upon the power of the general assembly to pass thereafter any act of incorporation not subject to repeal or amendment by legislative authority.
>
> "2nd. That upon the adoption of that constitution, every charter thereafter granted, even though it contained no reservation of the right to repeal or alter it, was subject to this paramount provision of the organic law."
>
> Jackson v. Walsh, 75 Md. 304.

(b) THE POWER TO ALTER, MODIFY OR REPEAL AN ACT OF INCORPORATION MAY BE RESERVED TO THE STATE BY GENERAL LAW, APPLICABLE TO ALL ACTS OF INCORPORATION; IN WHICH CASE THE POWER MAY BE EXERCISED WHENEVER THE CHARTER WAS GRANTED SUBSEQUENT TO THE PASSAGE OF THE GENERAL LAW.

Miller v. New York, 15 Wall. 478, 21 L. Ed. 98.

"Mr. Justice Miller, in Greenwood v. Union Freight R. Co., 105 U. S. 13, 17 L. Ed. 961, 693—which was a Massachusetts case—after quoting Section 41 of Chap. 68 of the General Statutes of Massachusetts, as follows: 'Every act of incorporation passed after the 11th day of March, in the year 1831, shall be subject to amendment, alteration or repeal at the pleasure of the legislature,'—used this language: 'It would be difficult to supply language more comprehensive or expressive than this. Such an act may be amended; that is, it may be changed by additions to its terms or by qualifications of the same. It may be altered by the same power and it may be repealed.'"

State v. Brown & Sharpe Mfg. Co., (R. I.) 17 L. R. A. 859.

"The following language is used by Mr. Justice Story in Inland Fisheries Commrs. v. Holyoke Power Co., 104 Mass. 446, 451, in referring to the power reserved to the legislature to amend charters: 'This statute, first introduced into the general legislation of the Commonwealth by Statutes 1830, Chap. 81, and reenacted in Rev. Stats., Chap. 44, Sec. 23, and in Gen. Stats., Chap. 68, Sec. 41, has been as much a part of all charters since granted as if

inserted therein, and was manifestly adopted with the intention of reserving for the future a fuller parliamentary or legislative power than would otherwise be consistent with the effect to be allowed to the special terms of particular charters, under the judicial construction of the constitutional prohibition against impairing the obligation of contracts.'"

Idem, page 861.

A State, under a general law in existence when the charter of a corporation was granted, authorizing it to alter, amend or repeal charters, may subject the corporation to taxation from which it was previously exempt.

Tomlinson v. Jessup, 15 Wall. 454, 21 L. Ed. 204.

Where the reservation of the right to alter or repeal every charter exists, a corporation is, from the moment of its creation, subject to the legislative power of alteration, and if deemed expedient, of absolute extinguishment as a corporate body.

Spring Valley Water Works v. Schottler, 110 U. S. 347, 28 L. Ed. 173.

Greenwood v. Union Freight R. Co., 105 U. S. 13, 26 L. Ed. 961.

See, also, Pearsall v. G. N. Ry. Co., 161 U. S. 665, 40 L. Ed. 844, 16 Sup. Ct. Rep. 705.

(c) RESERVATION OF THE POWER TO AMEND, ALTER AND REPEAL THE CHARTER OF A CORPORATION MAY LIKEWISE EXIST IN THE CHARTER ITSELF.

In the year 1806 in Wales v. Stetson, 2 Mass. 143, 3 Am. Dec. 39, the Supreme Court of Massachusetts made the declaration:

> "That the rights legally vested in all corporations cannot be controlled or destroyed by any subsequent statute, unless the power for that purpose be reserved to the legislature in the act of incorporation."

> "Mr. Justice Story in his concurring opinion in the Dartmouth College case, suggested that when the legislature was enacting a charter for a corporation, a provision in the statute, reserving to the legislature the right to amend or repeal it, must be held to be a part of the contract itself, and the subsequent exercise of the right would be in accordance with the contract and could not therefore impair its obligation. * * *

> Rhode Island was not slow to avail itself of Judge Story's suggestion. The Dartmouth College case was decided February 2, 1819, and though the session of the general assembly held that same month was a little too soon for the decision to bear fruit in legislation, and no charter was granted at the May session, yet at the June session of that year, three acts of incorporation were passed, viz., for the Savings Bank of Newport, the Cumberland Literary Society, and the Seventh Day Baptist Church of Christ in Hopkinton, all of which contained reservations of power to the general assembly to amend or repeal; that of the bank being in the form of a proviso at the close of the first section in these words: 'Provided that said corporation shall always be consider-

ed subject to any further act or acts of the legislature relating thereto, either in amendment or repeal of this act."

State v. Brown, etc., Idem. 860.

"Whatever rules Congress might have prescribed in the original charter for the government of the corporation in the administration of its affairs it retained the power to establish by amendment under the reserved right to alter, amend or repeal."

Union Pacific R. R. Co. v. United States (Sinking Fund Cases), 99 U. S. 700, 25 L. Ed. 496.

Such reservation of legislative power to amend or repeal a charter, (a) whether contained in a State Constitution, (b) in general laws, (c) in the charter itself, is not repugnant to the grant, but is a constitutional limitation on the powers granted.

Miller v. New York, 82 U. S., 15 Wall. 478, 497, 21 L. Ed. 98, 104;

State v. Brown, etc., *supra;*

Pennsylvania College Cases, 13 Wall. 213.

The basis for such reservation of power is the public interest:

"The object of the reservation was to prevent a grant of corporate rights and privileges in a form which would preclude legislative interference with their exercise, if the public interests should at any time require such interference, and to preserve to the State control over its contract with the corporators, which would otherwise be irrepealable and protected from any measure affecting its obligation.

Immunity from taxation, constituting a part of the contract between the government and the corporators or stockholders was, by the reservation of power contained in the law of

1841, *subject to be revoked equally with any other provision of the charter*, whenever the legislature might deem it expedient for the public interest that the revocation should be made. The reservation affected the entire relation between the State and the corporation, and placed under the legislative control all rights, privileges and immunities derived by its charter directly from the State."

Tomlinson v. Jessup, 15 Wall. 454, 21 L. Ed. 204.

THE PROVISO CLAUSE IN SECTION 9, SUPRA.

Section 9, *supra*, may accordingly be held to be a reservation of the power to amend, repeal or modify the charter in case—

1. The proviso does not appertain to the subject of taxation.

2. The proviso be treated as a condition subsequent or as surplusage.

THE PROVISO DOES NOT APPERTAIN TO TAXATION.

This is shown in the first place by—

1. The history of the charter and he conduct of the plaintiff in error and its predecessors in interest.

2. Taxes are not contemplated in the term *damages* in the proviso.

Under the first subheading it is noted that provision was made for the taxation of the Minnesota and Northwestern Railroad Company by Section 8 of Chapter 47, Laws 1854, being the original charter, as follows:

"Provided, also, whenever the net earnings of said road shall exceed twenty per cent on the amount of capital actually expended by said company in the construction and furnishing of said road and appurtenances, said corporation shall pay semi-annually to the treasurer of the Territory or future State of Minnesota, and take his receipt for the same, seven per cent of the said net earnings of said railroad."

As has been note Chapter 58, containing the reservation of the power to amend was passed February 17, 1855. Thereafter, and on March 1, 1856, was passed Section 2 of Chapter 47, which reads as follows:

"In consideration of the grant of lands contemplated in the 8th section of the Charter to said company, approved March 4, 1854, and of the extension of time to said company as herein stated, and in further consideration of the restoration of all rights, powers and franchises to said company which may be supposed to have for any cause become forfeited to the Territory of Minnesota, said corporation binds and obliges itself to pay or cause to be paid to the Territory or future State of Minnesota two per cent upon each dollar of the gross receipts, proceeds and income of said railroad, so far as the same may be received or due them on that part of said road lying within the limits of the Territory or future State of Minnesota, to be paid to the treasurer of said Territory or future State annually, on the first day of January in each year, from and after the day when the cars shall commence running on any part of said road in said Territory or future State of Minnesota, and which proceeds shall be appropriated to the payment of the Territorial or State government expenses, *and such payments shall be in lieu of, and the*

said company shall be exempt from the payment of any other imposts, taxes or dividends, any law to the contrary notwithstanding."

In passing let it be observed that the language underscored has reference solely to laws which might seek to tax the property of the company in specie, e. g. its locomotives, or other personal property, the vice of which is apparent, and is clearly set forth in the opinion covering the Anderson Law, so-called, in Stearns v. State, ex rel., 179 U. S. 223-240.

Thus it is to be observed that the Territory of Minnesota, the year following the passage of the reservation of power clause, passed an act providing for a different rate of taxation of the company, and it does not appear that the company ever claimed any violation of its contract rights.

It is also to be noted that Chapter 47, *supra*, of which Section 2, *supra*—being a provision for taxation—is part and parcel, is entitled "An act granting an extension of time to the Minnesota and Northwestern Railroad Company, and for other purposes."

It is to be noted provision is made in Section 1 of said chapter, that the officers of the company shall "accept fully the provisions of this act as a part of their original charter, as approved by the governor of this Territory, on the 4th day of March, 1854, and with a certificate that the said acceptance is in obedience to directions previously given by the board of directors." The acceptance was rather of the renewed charter than of the taxing provision as such.

We thus have the charter of the original company in the various legislative provisions with the reservation of power clause intact and unrepealed.

A particular reference to he constitutional amendment of 1871, the laws taxing railroads thereunder (Secs. 1667, 1668 and 1669, G. S. 1894) need not here be made, for this subject matter has been fully covered. Suffice it to say that, while the company held fast to the two per cent rate of taxation, as fixed in the charter, and the general law (Sec. 1669, *supra*) contemplated this, in other respects the company paid its taxes as did other railroads, both as to time, as provided in the general law, and as to form, as provided in the general law (Sec. 1679, G. S. 1894).

It appears, too, that the plaintiff in error has complied with the provisions of Section 2753, G. S. 1894, which provides for the apportionment of gross earnings on interstate business by all railroads doing business in the State.

The history of the charter and the conduct of the plaintiff in error and its predecessors in interest therefore show that the proviso does not appertain to taxation.

Under subheading 2, *supra*, it is submitted that "taxes are not contemplated in the term *damages* in the proviso." It is not incumbent upon the state to point out what damages are comprehended in the proviso clause, for which compensation shall be made, in case of an amendment or repeal of the charter. Attention is called to the following language:

"This reservation of power to alter or revoke a grant of special privileges necessarily became a part of the charter of every corporation formed under the general statute providing for the formation of corporations. A legislative grant to a corporation of special privileges, if not forbidden by the Constitution, may be a contract; but where one of the conditions of the grant is that the legislature may alter or revoke it, a law altering or revoking, or which has the effect to alter or revoke, the exclusive charter of such privilege, cannot be regarded as one impairing the obligation of the contract, whatever may be the motive of the legislature, or however harshly such legislation may operate, in the particular case, upon the corporation or parties affected by it. The corporation, by accepting the grant subject to the legislative power so reserved by the Constitution, must be held to have assented to such reservation. These views are supported by the decisions of this court. In Greenwood v. Union Freight R. Co., 105 U. S. 13, 17 (26 L. Ed. 961, 963), the question was as to the scope and effect of a clause in a general statute of Massachusetts, providing that every act of incorporation passed, after a named day, 'shall be subject to amendment, alteration or repeal at the pleasure of the legislature.' This court, referring to that clause, said: 'Such an act may be amended; that is, it may be changed by additions to its terms or by qualifications of the same. It may be altered by he same power, and it may be repealed. What is it may be repealed? It is the act of incorporation. It is this organic law on which the corporate existence of the company depends which may be repealed, so that it shall cease to be a law, or the legislature may adopt the milder course of amending the laws in matters which need amendment, or altering it when it needs substantial change. All this may be done at the pleasure of the

legislature. That body need give no reason for its action in the matter. The validity of such action does not depend on the necessity for it, or on the soundness of the reasons which prompted it.' The words 'at the pleasure of the legislature' are not in the clauses of the Constitution of Ohio, or in the statutes to which we have referred. But the general reservation of the power to alter, revoke or repeal a grant of special privileges necessarily implies that the power may be exerted at the pleasure of the legislature."

Hamilton Gaslight & Cook Co. v. City of Hamilton, 146 U. S. 968.

It was doubtless with a view of avoiding the spirit of harshness manifest by a reading of the above *dicta* that the reserved power of amendment in the charter at bar provided that compensation be made for damages in proper cases. Taxation is the prop wherewith the State sustains itself, and a uniform and equal system of taxation which affects the property of the plaintiff in error and other railroads alike must concededly be without damage to the plaintiff in error.

Mott v. Penn. R. R. Co., 2 Pa. St. 9, 72 Am. Dec. 664.

The court has a right, and it is its duty, to construe the proviso in question; whether the same appertains to taxation is for the court, and in construing the same, before it shall be held to appertain to taxation and thereby grant, it may be, an immunity from taxation, that the legislature so intended must affirmatively appear beyond a reasonable doubt, for such is the rule of construction

where immunity from taxation is claimed against the State.

Delaware R. R. Taxes, 18 Wall. 225.

THE PROVISO IS TO BE TREATED AS A CONDITION SUBSEQUENT OR AS SURPLUSAGE.

With a view to giving meaning and application to the proviso clause, and providing for compensation in proper cases, it must follow on account of the sovereign power of the State and its ability to compensate, that—

1. The power is vested in the State to amend the charter, and,

2. Compensation for damages is a condition subsequent.

It follows, therefore, that since the passage of the reservation of power clause there can be no such things as an irrevocable contract in the charter of the plaintiff in error. Jackson v. Walsh, 75 Md. 304. It follows, also, that the proviso was placed in Section 9, *supra*, for a purpose, and where the same has an application a facile construction thereof will attend upon the words. If an attempt be made to practically construe the proviso in the case at bar, then the compensation to be paid to the plaintiff in error would be the additional tax for which the suit is brought, which construction makes the section nugatory, and this seems a cogent reason for holding that he proviso as it relates to taxation is surplusage and without application. In other words, the power to amend, re-

specting taxation, is denied to the State, in case the proviso is held to apply to taxation.

It is a principle of statutory construction of general application that where the enactment and its saving clause are repugnant, the latter is rejected.

City of Duluth v. Duluth Street Ry. Co., 60 Minn. 178;

Billings v. Board, 78 Minn. 9.

> "If this proviso or saving clause means what defendant claims, it must be rejected as void, because repugnant with the enactment. It would fall within the principle stated by Lord Coke that 'when the enactment and its saving clause are repugnant—where a statute vests a manor in the king, saving the rights of all persons, or vests in him the manor of A, saving the rights of A—the saving clause is to be rejected, because otherwise the enactment would have been made in vain.' Walsingham's Case, 2 Plowd. 565; End. Interp. St. Secs. 184, 185."
>
> City of Duluth v. Duluth St. Ry. Co., *supra*, p. 182.

The plaintiff in error will claim the proviso defeats the power to amend. It is not contended that the proviso on its face is repugnant to the power to amend and, therefore, on the face of the statute is void, but rather that in its application to the case at bar, the proviso is repugnant and, therefore, we are brought within the rule of construction above noted.

RULE OF CONSTRUCTION.

> "The rule of construction in this class of cases is that it shall be most strongly against

the corporation. Every reasonable doubt is to be resolved adversely. Nothing is to be taken as conceded, but what is given in unmistakable terms, or by an implication equally clear. The affirmative must be shown. Silence is negation, and doubt is fatal to the claim. This doctrine is vital to the public welfare. It is axiomatic in the jurisprudence of this court."

N. W. Fertilizing Co. v. Hyde Park, 97 U. S. 659, 666;

Rice v. Minn. & N. W. Ry. Co., 1 Black. 380, 17 L. Ed. 154;

Pearsall v. G. N. Ry. Co., *supra*.

"The taxing power being of such vital importance, and so essential to the existence of government, its relinquishment by a state is never to be assumed. The whole community is interested in retaining undiminished this power to levy taxes, and they have a right to insist that its abandonment ought not to be presumed in any case in which he deliberate purpose of the State to abandon it does not distinctly appear."

See cases citd in note to Mott v. Penn. Ry. Co., 72 Am. Dec., p. 384.

X.

DID THE LEGISLATURE INTEND TO ENTER INTO AN IRREPEALABLE CONTRACT BY SECTION 2 OF CHAPTER 47, SUPRA.

Under a consideration of this heading it is proper to note that the charter of the plaintiff in error historically considered, as far as here material, is as follows:

a. "An act to incorporate the Minnesota & Northwestern Railroad Co." (Chap. 47, Laws 1854.)

b. "An act entitled 'An act to incorporate the Minnesota & Northwestern Railroad Company,' is hereby re-enacted, subject to the amendments and provisions herein contained." (Sec. 7, Chap. 58, Laws 1855.)

c. Provision that the officers shall

"accept fully the provisions of this act, as a part of their original charter, as approved by the Governor of this Territory on the 4th day of March, 1854, and with a certificate that the said acceptance is in obedience to directions previously given by the board of directors." (Sec. 1, Chap. 47, Laws 1856.)

It therefore follows that the legal effect of the three acts in question is (a) a granting of the charter; (b) a regranting of the charter with amendments, and a reservation of power to amend; (c) an extension of time, with other provisions, and an acceptance thereof as a part of the charter.

It cannot be contended that the reservation of power to amend was repealed by Chapter 47, *supra*, which contained the taxing provision, but rather that the reservation existed concurrently therewith, the same as if the reserved power and the taxing clause were in the same statute. Repeals by implication are not favored.

Nichols v. St. Paul, 80 Minn. 415.

The plaintiff in error in this immediate connection relies on the case of New Jersey v. Yard, 98 U. S. 104.

The court in said cause, on p. 114, made the following observation:

> "The difficulty in this class of cases has always been to distinguish what is intended by the legislature to be an exercise of its ordinary legislative function in making laws, which, like other laws, are subject to its full control by future amendments and repeals, from what is intended to become a contract between the state and other parties, when the terms of the statute have been accepted and acted upon by both parties. This has always been a very nice point; and, when the supposed contract exists only in the form of a general statute, doubts will recur after all our decisions on that class of questions."

The provision respecting taxation in said cause was in a supplement to the charter passed in 1865, whereas the reservation of power was in a supplement passed in 1836. The provision respecting taxation was held by the court to evince a contract by reason, among other things, of its mutuality, consideration, and provision for written acceptance. The court held that the legislature intended to enter into an irrepealable contract, and that the reserved power to amend in the prior supplement was *pro tanto* repealed.

It is submitted that the case in question is not conclusive against the State, for the reason, among others, that Section 2 of Chapter 47, *supra*, does not embody the contractual elements found in the New Jersey statute, and the reservation of the right to amend in the charter of the plaintiff in error was re-enacted concurrently in the passage and adoption of Chapter 47, *supra*, which con-

tained the provision with reference to taxation, showing that the intention of the legislature was to reserve the right to amend.

CONCLUSION.

IT FOLLOWS IN CONCLUSION THAT:

1. No irrepealable contract right in the two per cent taxing provisions of the original charter, as amended by Section 9 of Chapter 58, Laws of 1855, was ever granted to the Minnesota and North Western Railroad.

2. The two per cent taxing provision was personal to the Minnesota and North Western Railroad Company.

3. The two per cent taxing provision of the charter of the Minnesota and North Western Company, as an irrepealable contract, never survived the adoption and operation of the equality and uniformity clauses of the State Constitution.

4. The act of 1883, under which there was a revival of the operation of the original charter, which had *ceased and become void*, was subject to the Constitution, which by the amendment of 1871, had validated the gross earnings system, subject to amendment and repeal.

5. The sale on December 8, 1887, by the Minnesota and North Western Company to the Chicago, St. Paul and Kansas City Company, could not competently pass an immunity from taxation as an irrepealable contract. The Constitution forbade it.

6. The sale on September 17, 1893, by the Chicago, St. Paul and Kansas City Company to the plaintiff in error could not competently pass an immunity from taxation as an irrepealable contract. The Constitution forbade it.

7. No rule of property against raising the rate of gross earnings tax exists in favor of the plaintiff in error, within the contract clause of the Federal Constitution.

8. The power to change the rate of taxation is expressly provided for by the Minnesota Constitutional Amendment of 1871; this court in the Stearns case (179 U. S. 223) affirmed that right, within reasonable limits; and there being no claim in this case that the changed rate is unfair or unreasonable, it should be sustained irrespective of other features of this case.

9. The facts of this case and the argument supporting the foregoing conclusions are clearly stated in the opinion of the Minnesota Court, which, together with the opinion in the Great Northern case, for convenience of reference we have printed in full in the annexed appendix.

The case should be affirmed.

Respectfully submitted,

GEORGE T. SIMPSON,
Attorney General.

GEORGE W. PETERSON,
Assistant Attorney General.

APPENDIX.

15991.

Supreme Court, October Term, A. D. 1908.

No. 46.

State of Minnesota, Appellant,

vs.

Chicago Great Western Ry. Co., Respondent.

SYLLABUS.

State v. Great Northern Ry. Co., filed herewith, sustaining the validity of Chap. 253, General Laws 1903, increasing the gross earnings tax of railroad companies of the state to four per cent, followed and applied.

Judgment reversed.

STATE OF MINNESOTA.

15991.

Supreme Court, October Term, A. D. 1908.

No. 46.

State of Minnesota, Appellant,

vs.

Chicago Great Western Ry. Co., Respondent.

OPINION.

This action, like that of State v. Great Northern Company, filed herewith, involves the validity of

c. 253, General Laws 1903, increasing the rate of the gross earnings tax upon railroad companies in this state to 4%. As in the Great Northern case, defendant asserts an irrepealable contract, under which it claims the right forever to discharge its tax liability by the payment of a 2% rate. The fixed rate claimed by the Great Northern Company was 3%. The determination of the case involves, as in the other case, the construction of an old territorial railroad charter, the facts with reference to which are as follows:

By c. 47, Territorial Laws 1854, the Minnesota and Northwestern Railroad Company was duly incorporated and authorized to construct a railroad within the limits of the territory, the line of which road in a general way was therein designated. The act was accepted by the persons named as incorporators, but no effort was made by them to construct the road. By c. 58, Laws of 1855, the act incorporating the company was amended by adding thereto, among other things, a provision requiring the company to construct and equip fifty miles of its road within three years after the passage of the amendment, and the entire line within six years, in default of which, the act provided, the charter of the company and all grants and rights thereby conferred "shall cease and be void." This act also contained a clause reserving to the legislature the right of amendment after the expiration of twenty years. In the original charter, and also in the amendment just mentioned, the company was required to pay into the treasury of the ter-

ritory or future state 7% of its net earnings. Whether this was intended as a substitute for taxes to be levied and collected in the usual way was not expressly stated. But in 1856, by c. 47 of the laws of that year, the charter was again amended by imposing a 2% gross earnings tax in lieu of all other taxes. It is upon this act and the rate of taxation therein imposed that defendant relies in support of its defense. Defendant claims to have succeeded to all the rights of this old company, including the right to an irrepealable 2% tax contract. The facts leading up to this asserted succession are as follows: The old company, though fully organized, wholly failed to construct its railroad within the time prescribed by its charter and did nothing in that direction until sometime in 1884, thirty years after its organization and twenty-four years after the time limited for the completion of the road. By this failure the company forfeited all its rights under the charter and all grants thereby conferred "ceased and were void." But by c. 83, Special Laws 1883, the legislature of the state recognized the existence of the corporation and in effect waived the default in the construction of the road by authorizing the consolidation of "its stocks, franchises, rights and property with that of any other railroad company which will undertake the construction and operation of the railroad which the said Minnesota and Northwestern Railroad Company is authorized to construct and operate." Sec. 2 of that act amended Sec. 7 of the original charter by authorizing the

construction of a line of road differing somewhat from that authorized by the old charter. The company was thus revived from its extended slumbers and proceeded to construct its road, and completed it sometime in the year 1885. It thereafter operated the same until December of 1887, when it conveyed all its property, "contracts, rights, privileges and immunities" to the Chicago, St. Paul and Kansas City Railroad Company, a corporation created, organized and existing under the laws of the state of Iowa. Counsel for defendant treat this transfer as a consolidation of the two companies, authorized by the act of 1883. But as we read the documents by which the transfer was effected the transaction took the form of an absolute and unconditional sale by the Northwestern Company. The Kansas City Company took possession of the road and thereafter continued its operation until June, 1892, when it leased the line and all property connected therewith to the Chicago Great Western Railroad Company, defendant herein, a corporation organized and existing under the laws of the state of Illinois. Subsequently, in September, 1893, the Kansas City Company conveyed the property so leased, and all contracts, franchises and immunities to its lessee, the Great Western Company, since which time the latter has continued in the operation of the road. Again counsel claim that the conveyance by the Kansas City Company to defendant was a consolidation and authorized by law. This, however, is not important. The fact remains that the transaction

resulted in an absolute transfer of the railroad property to defendant, and in as much as both these companies were foreign corporations, the laws of this state would not control their dealings, and this state could neither authorize nor prohibit their consolidation. But that question in no way controls the result in this case. The old Northwestern Company, after the completion of its road in 1885, commuted its taxes by the payment of the 2% rate imposed by the amendment of its charter in 1856, and the succeeding roads, including defendant, have paid the same rate.

Defendant having refused to pay the rate prescribed by the statute under consideration, this action was brought to recover the amount of the increased rate. It is the contention of defendant that the terms of the old Northwestern charter fixing a two per cent rate constituted a contract between the company and the territory or future state, irrevocable and irrepealable, to which defendant has succeeded, and that to enforce the new rate would impair the terms of the contract in violation of both the state and the federal constitutions. Defendant does not contend that the new rate is unreasonable or unfair, or at all disproportionate to the rate paid by other taxpayers, but stands squarely upon its asserted legal right to a perpetual two per cent rate. The trial court sustained this view, ordered judgment for defendant, and the state appealed.

The charter of this road has never heretofore been before the court for construction. No ques-

tion has ever been raised relative to the rights of defendant or its predecessors upon the subject of taxation; and the construction of the old charter and amendatory acts, and the right of the state to change the rate of taxation thereby imposed, are before us for the first time. Most of the questions involved were presented in the Great Northern case where they were fully considered and disposed of adversely to the contentions of defendant. We there held, among other things, that the charter provisions of the old Minnesota and Pacific Company, upon which the Great Northern Company relied, did not constitute an irrepealable contract which passed unimpaired to the successors of that company; and further that the gross earnings tax system first came into legal existence in this state by force of the constitutional amendment of 1871, and that it then came subject to the reserved right of the state to amend or repeal the same as public interests might justify or require. The language of the charter under consideration, in so far as it imposes this form of taxation, is for all practical purposes the same as that construed in the Great Northern case, and the conclusions there reached fully apply at bar and we adopt and follow them.

The conclusion is in no way affected, nor defendant's rights in any way enlarged or extended, by c. 83, Special Laws 1883. The original company, the Minnesota and Northwestern, failed to construct the road within the time limited by its charter and remained inactive for thirty years. Under the language of the charter, all its rights

therefore "ceased and were void," and the charter could have been forfeited by appropriate action of the state. But no proceedings were taken for that purpose, and it may be conceded that the act of 1883 was a recognition of the legal existence of that company at that time and a waiver of the right to declare a forfeiture. But such waiver and recognition were clearly subject to the then existing constitutional mandate prohibiting the granting of special privileges on the subject of taxation. It was also subject to the constitutional amendment of 1871, which provided, in effect, that all gross earnings statutes might be changed or amended by a vote of the people, under the authority of which the statute in question is valid as to defendant. In so far as the legislature may be said by the act of 1883 to have intended or attempted to confer upon the Minnesota and Northwestern Company a perpetual two per cent rate, when all other roads were taxed three per cent, it violated the constitutional mandate of equality in taxation, and its action was void. The legislature could no more grant this special privilege by the revival of an old corporation than it could confer a one per cent privilege upon an entirely new company. Neither are the rights of the parties, as urged by defendant, to be construed as of the date the original charter was granted, but, on the contrary, as of the date of the revival of the practically defunct company and the waiver of the right of the state to declare a forfeiture of the charter, namely, at the time of the passage of the act of 1883. At that time the legis-

lature could do one of two things, declare a forfeiture or waive the right, as it did, and continue the authority of the company to proceed and construct its road; but this was necessarily subject to the then existing constitutional restrictions pertinent to the subject of taxation. Trask v. McGuire, 85 U. S. 391; Louisville, etc., Ry. Co. v. Palmes, 109 U. S. 244; Keokuk Ry Co. v. Mo., 152 U. S. 301; Yazoo Ry. Co. v. Adams, 180 U. S. 45. At that time the right of the state to change the rate was clear. Stearns v. State, 179 U. S. 223.

Again, the act of 1883 is wholly silent upon the subject of taxation, and, though a consolidation with other lines was authorized, the right to assign or transfer the commuted system of taxation at an irrepealable rate was not expressly or impliedly granted and did not pass to the successors of the original company. As stated in a note to Adams v. Ry. Co., 60 L. R. A. 33, the general rule deducible from all the authorities is that an exemption from taxation, belonging to a corporation, is a privilege altogether personal to the grantee, "incapable of transference to another save by a specific enabling law couched in explicit language apt to the purpose." No such language, nor any language indicative of an intention to confer the right of alienation, is found either in the original charter or in the revival act of 1883. An unchangeable rate of taxation did not therefore pass to he successors of the Northwestern Company. Morgan v. La., 93 U. S. 217; Wilson v. Gaines, 103 U. S. 417; Gulf, etc., Ry. v. Hewes, 183 U. S. 66; Ry. Co. v. Miller,

114 U. S. 176; Ins. Co. v. Tenn., 161 U. S. 174; City v. Ry. Co., 182 N. Y. 99. The language of the act of 1883 authorizing the Northwestern Company to "consolidate its stock, franchises, rights and property" with any other road, conceding that the transaction by which the defendant succeeded to the rights of the old road amounted to a consolidation, did not, within the authorities cited, include the right to transfer an irrepealable right to a two per cent tax.

Counsel for the state advance several other reasons in support of the contention that the state possesses the right to increase the rate. One of which is found in the reserved right of amendment incorporated in the Northwestern charter by the act of 1855. That act, which amended the original charter, expressly provided that the "legislature of the territory or future state of Minnesota may repeal, amend or modify this act and the act to which this is amendatory from and after twenty years from the passage of this act. Provided compensation to be made to said company for all damages sustained thereby." It is insisted that this reservation conferred upon the state the power to increase the tax rate of this road, independently of other grounds urged, while counsel for defendant contend to the contrary. We find it unnecessary to consider this or any other of the points urged by the state, not already passed upon. What has been said disposes of the case and sustains the right of the state to increase the tax and further consid-

eration of the other questions would unnecessarily prolong the opinion.

Our conclusions are that c. 253, General Laws 1903, is valid as to defendant and that the state is entitled to judgment against it for the increased tax.

The judgment appealed from is therefore reversed and final judgment ordered in this court for the amount due the state, as shown by the complaint. (Trans. p. 203 *et seq.*); (106 Minn. 290.)

15994—5.

STATE OF MINNESOTA, SUPREME COURT,

OCTOBER TERM, A. D. 1908.

No. 27-28.

STATE OF MINNESOTA,

Appellant,

vs.

GREAT NORTHERN RY. CO.,

Respondent.

STATE OF MINNESOTA,

Respondent,

vs.

GREAT NORTHERN RY. CO.,

Appellant.

Syllabus.

1. Chapter 253, General Laws 1903, approved at the general election of 1904, as provided by Sec. 32a of Art. 4 of the State Constitution, increasing the rate of the gross earnings tax of railroad companies doing business in this state to four per cent., is valid as to defendant and all its lines of road and branches thereof. The statute impairs no contractual or other vested right of defendant and is not repugnant to either the state or the federal constitution.

2. Parcher v. Ry. Co., 14 Minn. 297, and other similar cases, distinguished.

Reversed with directions to enter judgment for the state.

Opinion.

This action involves the validity of Chapter 253, General Laws 1903, approved by the people at the general election of 1904, as provided for by Article 4, Sec. 32a, of the State Constitution, increasing the gross earnings tax upon railroad companies of the state to four per cent. Though the facts and various statutes bearing upon the case, and which controls its determination, have been stated and referred to in prior opinions, a restatement is necessary to an understanding of the present opinion.

By an act approved March 3, 1857, Congress granted to the territory of Minnesota certain public lands to aid in the construction of railroads therein. (Edgerton's R. R. Laws, 82.) The act particularly defined the terms of the grant and expressly provided that the lands thereby granted were subject to the future disposal of the territory or state for the purposes therein expressed and no other. This when accepted created a trust which the territory or future state was bound to carry out in form and spirit as directed by the terms of the grant. For this purpose the territorial legislature by Chapter 1, Sp. Laws 1857, in effect accepted the grant and provided for the incorporation of the Minnesota and Pacific Railroad Company, and conferred upon it and its successors authority to construct and

operate certain lines of railroad within a territory including specified branches, and providing for the conveyance to the company of the lands granted by Congress, substantially upon the terms and conditions imposed by the act of Congress. This act constituted the charter of the railroad company. Its organization was completed, and the company, after formally accepting the act, commenced the construction of the railroad therein provided for. Lack of capital to prosecute the work necessitated a loan by the company and it mortgaged by trust deed its line, all its property and franchise privileges to Elon Farnsworth, and others, to secure the payment of funds thus obtained. This mortgage was executed on *July* 31, 1858, and was supplemented by a second mortgage to the same parties in November, 1858, securing the payment of bonds issued by the company, a part of which were delivered to the state in exchange for its bonds issued under the constitutional amendment of April 15, 1858, to aid in the construction of the road. Edgerton's R .R. Laws, 3. The state bonds, to the amount of $5,000,000, though the company utterly failed to construct the road and the state in fact received no consideration therefor, the state, after a prolonged contest, by the decision of this court in *State ex rel v. Young*, 29 Minn. 474, was rightly compelled to pay.

Section 18 of the charter of the Minnesota and Pacific Company contained two distinct provisions upon the subject of taxation, in the language following:

(1) "In consideration of the grants, privileges and franchises herein conferred on the said Minnesota and Pacific Railroad Company, the said Company shall and will, on or before the 1st day of March in each year, pay into the territory or future state, three per centum of the gross earnings of the said railroad * * * and in consideration of such annual payments, the said Company shall be forever exempt from all assessments and taxes whatever by the territory, or state which shall succeed the territory, or by any county, city, town, village, or other municipal authority, upon all stock in said Minnesota and Pacific Railroad Company, whether belonging to said Company or to individuals, and upon all its franchises or estate, real, personal or mixed, held by said Company;" and

(2) "that said land granted by said act of Congress hereby authorized to be conveyed to the said Minnesota and Pacific Railroad Company, shall be exempt from all taxation till sold and conveyed by said company."

The company did not complete the construction of the lines of road provided for by its charter and made default in the payment of the Farnsworth mortgage. Whereupon, on June 3, 1860, the mortgage was duly foreclosed by advertisement in the manner and in accordance with its terms and the statutes of the state in such case made and provided, and the railway, properties, franchises, rights, and privileges of the company were purchased by the state for the sum of $1,000, it being the highest and best bidder at the sale. By this purchase the state became vested with all the railroad properties, and, no redemption being made, the company became wholly divested of its rights. In

March, 1861, for the purpose of giving the company another opportunity to complete the roads contemplated, the state legislature by an act approved March 8, 1861, restored to the company all rights lost under the foreclosure upon the terms and conditions specified in the act, one of which was that if the company failed to construct a line of road between St. Paul and St. Anthony before January 1st, 1862, all rights under the act should be forfeited to the state without any further act or ceremony on its part. The company failed to comply with the conditions, and in consequence the land grant and all property, rights, privileges, and immunities of the company reverted to and became finally, fully, and absolutely vested in the state. Thereafter the state legislature by Chapter 20, Sp. Laws 1862, being an act to facilitate the construction of the Minnesota and Pacific Railroad, and to amend and continue the act incorporating that company, provided for the organization of the St. Paul and Pacific Railroad Company, and thereby granted to that company, and its successors, all rights, privileges, franchises, lands, and property theretofore granted to the Minnesota and Pacific Company and restored to the state by the foreclosure just referred to, and authorized it to construct the lines of road undertaken by the old company. The terms and conditions relating to the construction of the road and the conveyance of lands as the work progressed were in all respects in conformity with the act of Congress. That company accepted the act and proceeded to the performance of the obligations

thereby assumed. By Chapter 3, Sp. Laws 1864, the St. Paul and Pacific Company was authorized to issue one or more classes of preferred stock and to enter into agreements or contracts with the holders thereof for the administration of the portion of the road to which the stock might pertain, and for the independent organization by such holders to enable them separately or in conjunction with the general directors of the road to exercise supervision and control of their separate portion of the road. Under this act preferred stock was duly issued and the holders thereof, acting under the statute just referred to, organized and incorporated the First Division of the St. Paul and Pacific Railroad Company, which Company, through its officers, thereafter co-operated with the St. Paul and Pacific Company in the construction of the road. The act incorporating the latter named company contained no express reference to the rate or system of taxation to be imposed upon the company, but it is claimed that all the provisions on this subject contained in the old Minnesota and Pacific Company's charter passed by the terms of the act incorporating it and were included within the designation of "rights, privileges and immunities." However, by Chapter 6, Sp. Laws 1865, an act to facilitate the completion of the St. Paul and Pacific Railroad and branches, the legislature imposed a different rate of taxation than that contained in the Minnesota and Pacific Company's charter, in this, that by this act the company was required to pay during the first three years, after thirty miles

of its road had been completed, one per cent. of its gross earnings, two per cent. during the succeeding seven years, and thereafter three per cent. The act also contained a provision that the lands of the company should be subject to taxation as soon as sold, leased, or contracted to be sold or leased. The St. Paul and Pacific Company formally accepted this act, and the First Division Company thereafter complied with its terms and provisions by paying the rate of taxation thereby imposed. The organization of the First Division Company was legalized and confirmed by Chap. 1, Sp. Laws 1866. Between 1862 and 1871, both these companies separately executed trust deeds and mortgages covering the main line of the road and all its branches according to the ownership of the same by the separate companies, thereby conveying to the mortgagees or trustees all property, rights, privileges, franchises, and immunities held, owned, or possessed by either company. Both companies made default in the payment of the indebtedness secured by these instruments and they were duly foreclosed in the manner prescribed by law, John S. Barnes, for himself and associates, being the purchaser at the sale made under the foreclosure as to the branch line. Thereafter Barnes and his associates incorporated under the laws of the state the St. Paul, Minneapolis, and Manitoba Railroad Company, and to this company they conveyed all rights acquired under the foreclosure stated. Thereafter the mortgage on the main line was foreclosed and the Manitoba Company became the purchaser. By these foreclosures the Manitoba

Company became the sole owner of all rights, privileges, and property of the two other companies. The Manitoba Company leased its line, together with all property rights, franchises, privileges, and immunities to the defendant Great Northern Company, incorporated under the laws of the state for the term of 999 years. The old Pacific and the First Division Companies paid taxes to the state upon the basis of the act of 1865, already referred to, viz: one per cent. for the first three years after the completion of thirty miles of road, two per cent. for the succeeding seven years, and thereafter, and until their rights passed from them by the foreclosure proceedings just referred to, at the rate of three per cent. of their gross earnings. The Manitoba Company paid this rate at all times during its ownership and operation of the road. In 1871, there was duly incorporated into the Constitution of the state a provision to the effect that no statute theretofore enacted or thereafter to be enacted imposing a gross earnings tax upon the railroad companies should be repealed or amended except upon a submission of the proposition to a vote of the people. Sec. 32a, Article 4, State Constitution. Acting under this mandate, the legislature, by the statute made the basis of this action, amended the gross earnings tax statutes theretofore enacted by raising the rate to four per cent. This applied to and made a uniform rate for all railroads of the state, (State v. Duluth & Northern Ry. Co., 102 Minn. 26) and was submitted to and ratified by the people, and thus became a valid enactment unless the contention

of defendant presently to be mentioned be sustained.

This action was brought to recover the amount of the increased tax, the company having paid the old rate of three per cent. The defense to the action is that the charter provisions of the Minnesota and Pacific Railroad Company imposing upon it a three per cent. rate became upon acceptance by the company an irrepealable contract which passed unimpaired, as an appurtenant to the road and its franchises, by and through the various transfers of the rights and privileges of that company, to defendant, successor in interest of all prior companies. It is insisted that to enforce the statute in suit would impair the obligations of that contract and destroy and take from defendant a vested property right in violation of both the state and the federal constitutions. It appears from the record that several branches have in the past been constructed in connection with the main line of road, which were not expressly provided for by the original charter of the Minnesota and Pacific Company. As to these the trial court held the increase of the tax valid, but invalid as to the lines and branches contemplated by the original charter.

Judgment was ordered accordingly, and both parties appealed. We approach with some embarrassment the consideration of the questions presented owing to the expressions found in prior opinions in cases involving railroad taxation, which seem to and which defendant's counsel earnestly insist, fully determine the questions involved in the present case adversely to the contention of the state. But in

view of the fact, which will be demonstrated further along in the opinion, that the question here presented, viz: whether the provisions of the Minnesota and Pacific Companys charter on the subject of the earnings tax constituted an irrevocable contract, was not involved in any prior litigation between the state and the railroad company, and what was said in the previous cases bearing upon the question was wholly unnecessary to the decision of the particular case, and therefore not of binding force or effect, we take up and dispose of the present case as though the question were, as it is, here for the first time. Whatever doubts the previous decisions may have created are all cleared up by a close analysis of the precise issues there presented.

1. The right of a state government through its legislature, when not restricted by constitutional provisions, by contract to limit its power of taxation is a doctrine too firmly established to admit of discussion at this time. It has been affirmed by the highest tribunal in the country, and though vigorously combatted by some able state courts, the question must be deemed for present purposes completely at rest. Oliver v. Ry. Co., 30 Ark. 128; Day v. Lawrence, 167 Mass. 371; Richmond v. Ry. Co., 21 Gratt, (Va.) 613; Wilmington Ry. Co. v. Reid, 13 Wall., 264; 12 Am. & Eng. Ency. Law, 272. The contract to be irrepealable, however, must clearly and conclusively appear. The power of taxation is a sovereign prerogative; its exercise is indispensable to the maintenance of the state and its institutions, and no inferences or presumptions arising

from indefinite and uncertain language that it has relinquished, limited, or abandoned the right, as to any particular person or corporation, should be indulged by the court in support of an immunity not enjoyed by all tax payers alike. Therefore the contract is strictly to be construed and must be in language and terms too clear to admit of doubt. Chicago, etc. Ry. Co. v. Missouri *ex rel.* Guffy, 120 U. S. 569; State *ex rel* v. Stearns, 72 Minn. 200; County v. Bell, 43 Minn. 344. The rules governing the courts in construing contracts of this kind are tersely stated in a note to Adams v. Yazoo Ry. Co., 60 L. R. A., at page 38:

> "In construing and interpreting contracts of this class, the courts are guided by a set of principles that have now become fundamental. * * * These, in brief, are, chiefly, that taxation is the rule, and exemption the exception; the power of taxation is an essential attribute of sovereignty, necessary and vital to the very existence of the government; the whole community is interested in its maintenance unimpaired; it is presumed never to have been surrendered; and the intention to surrender it must be expressed in language so clear and free from ambiguity as to admit of no reasonable doubt. An exemption never arises by implication; it is always restricted to its lowest possible terms; every doubt must be resolved in favor of the government and against the claimant."

A long list of supporting authorities there cited discloses a uniform trend of judicial opinion on the subject.

Under the rule stated, it would seem at least doubtful whether the charter of the Minnesota and

Pacific Railroad Company, in so far as pertinent to the subject of gross earnings taxation, constituted an irrepealable contract between the territory and the railroad company which forever bound the territory or future state, not only respecting the method of taxation, but also the rate thereof. Two distinct provisions on the subject of taxation were embodied therein, the first providing for a gross earnings tax in lieu of all other taxes and assessments, and second an exemption of the land granted until sold or contracted to be sold by the company. The charter provided on the subject of the earnings tax that in consideration of the grants, privileges, and franchises therein conferred by the territory, the railroad company should pay annually into the treasury of the territory or future state three per centum of its gross earnings, in lieu of all other taxes; "and in consideration of such annual payments, the said Company shall be forever exempt from all assessments and taxes whatever * * *. It is evident that a mere personal privilege was extended to the company which it might exercise or not at its option. If it failed to pay the earnings tax, the exemption ceased, and the territory could then resort to the usual method of compelling the company to contribute its share to the public burdens. The charter contains no express language indicating an intention that the company should forever submit to this form of taxation, and if it was not so obligated then, under the rule requiring mutuality in contractual obligations, the territory was not bound by that system. In other words, a

fair construction of the language of the charter within the strict rule, would seem to justify the conclusion that the parties intended the earnings system of taxation to continue so long as the company complied with the terms thereof by making the annual payments, and not as an irrevocable contract binding upon both parties for all time. That the right of modification was intended to be reserved to the territory is evidence by the subsequent legislation and conduct of defendant's predecessors. By Chapter 6, Sp. Laws 1865, the legislature modified the original charter by providing for the payment of one, two and three per cent., instead of a uniform rate of three per cent. This act was accepted by the St. Paul and Pacific Company, and acquiesced in by the First Division Company by a compliance with its provisions. By this modification defendant's predecessors received and retained the benefit of an average annual reduction in their taxes of about forty per cent. for the period of ten years. This amounted to a practical construction of the contract, so far as involving the right of the state to change the rate, and if the old companies were here contesting the validity of the present statute, increasing the rate, their denial of the power of the state to so act would come at least with little or no force. While their acquiescence in the prior change would perhaps not be conclusive against them, it furnishes strong evidence that the old charter was not regarded at the time as irrepealable. Defendant, their successor, is in no better position. The right of modification is further evidenced by

the amendment to the Constitution in 1871, by which it was provided that the system of gross earnings taxation as to railroad companies should not thereafter be changed except by a statute submitted to and approved by the electors.

We are of course not to be understood as intimating an opinion that a contract of the tenor and effect of the one claimed could not legally have been entered into by the territory, or that the conduct of the state in subsequently acting thereon and receiving from the railroad company payment of taxes under the method then adopted was so utterly void as to justify the company in reclaiming the money paid when in consideration of its payment it avoided the property tax, or justify the state in retaining the money and also imposing a property tax. So far as performed or executed by the parties, by the payment and acceptance of the tax, the contract was undoubtedly binding. 29 Am. & Eng. Law 828. But it is unthinkable that the territorial legislature intended forever, until "domesday and ' vond," thus to preclude the state from applying to this company the same rule that the exigencies of the future might require it to adopt respecting the taxation of like companies in order to secure from them their equitable and ratable share of the necessary public revenues.

2. But, passing this question, upon which we merely express doubts, and conceding for present purposes that the charter provisions constituted an express contract between the territory and the Minnesota and Pacific Company, and that as to that

company it was irrepealable, was it personal to the company, or did it become attached as an appurtenant to the charter, rights, franchises, and privileges of the company and pass down the line to defendant? We are of opinion that the question should be answered in the negative.

As a general rule, an exemption from taxation or the right to a particular form or method of taxation conferred by law upon a corporation is a personal privilege and inalienable by the grantee to another without express legislative authority. The law on the subject is clearly summed up in the case of Morgan v. La., 93 U. S. 217, where in the course of a discussion of the subject the court said:

> "Much confusion of thought has arisen in this case and in similar cases from attaching a vague and undefined meaning to the term 'franchise.' It is often used as a synonymous with rights, privileges and immunities though of a personal and temporary character; so that if any one of these exists, it is loosely termed a 'franchise,' and is supposed to pass upon a transfer of the franchises of the Company. But the term must always be considered in connection with the corporation or property to which it is alleged to appertain. The franchises of a railroad corporation are rights and privileges which are essential to the operations of the corporation, and without which its roads and works would be of little value; such as the franchise to run cars, to take tolls, to appropriate earth and gravel for the bed of its road, or water for its engines, and the like. They are positive rights or privileges, without the possession of which the road of the Company could not be successfully worked. Immunity from taxation is not one of them. The former may be conveyed to a purchaser of the road as part of the property of the Company; the latter

is personal and incapable of transfer without express statutory direction." See, also, authorities cited in 60 L. R. A. 1; and 35 Am. St. R. 390.

We have no statute in this state, nor did any exist in territorial days, authorizing, directly or indirectly, the mortgaging sale, or other transfer of an exemption of this sort. The charter of the Minnesota and Pacific Company contained no such provisions, nor any language which, by implication, would justify the conclusion that a sale, mortgaging, or other transfer of the privilege was authorized or even contemplated. The exemption does not pass as an appurtenant to railroad properties, and is not included within the expression "rights, privileges, and immunities." Gulf, etc., Ry. Co. v. Hewes, 183 U. S. 66; C. & O. Ry. Co. v. Miller, 114 U. S. 176; Lake v. Drummond, 49 S. E. 506; Rochester v. Ry. Co., 182 N. Y. 99; Covington Turnpike Co. v. Sandford, 164 U. S. 578. A distinction must not be overlooked when considering the assignability of a tax exemption between those imposing a commuted system in lieu of property taxes, and those exempting specific property. In the former case the system does not attach to the corporation or concern thus taxed nor to any particular property, and necessarily is personal and not assignable. But where, as in the case at bar, specific land is granted to a railroad company to aid in the construction of a railroad company is specifically exempted from taxation until sold by the company, and the company accepts in consideration of the

exemption, the exemption attaches to and follows the land. New Jersey v. Wilson, 7 Cranch. (U. S.) 164; State v. Hicks, 30 Am. v. 423; Ry. Co. v. State, 75 Tex. 356. In such case, as we have frequently held, as will be shown later, the exemption is appurtenant to and passes with the land to a succeeding corporation assuming the burden attached to it.

It is an elementary rule of uniform application that rights or things in action which do not survive to an executor or administrator are not assignable. An exemption from taxation comes within the rule. And though such a right or immunity might be made assignable by the express terms of the grant creating it, the language of the grant under consideration does not, either expressly or impliedly, provide therefor. The exemption was by the terms of the charter extended to the Minnesota and Pacific Railroad Company, and not to it "and its successors and assigns." City of Rochester v. Ry. Co., 182 N. Y. 99. Nor is an exemption a property right, or in any proper view analogous to the grant of the right to construct and operate a railroad or to lay gas or water mains in a public street. Such franchises may be classified as property or property rights and are transferable without express authority from the granting power. Speaking upon this subject the Court of Appeals of New York, in the case last cited, said:

> "We have frequently held that, in the absence of express statutory direction, or of an equivalent implication by necessary construction, provisions in restriction of the right of the state to tax the property or to regulate the

affairs of the corporations do not pass to new corporations succeeding by consolidation or by purchase under foreclosure to the property and ordinary franchise of the first grantee. * * * This we have stated to be a statutory rule of interpretation, founded upon an obvious public policy, which regards such exemptions as in derogation of the sovereign authority and of common right, and therefore not to be extended beyond the exact and express requirements of the grant construed *strictissimi juris*. That privilege is not at all similar to such franchises as the right to construct and operate a railroad, to lay gas mains and supply gas, and to maintain a ferry. These franchises, when granted, become property similar in their general attributes to other property. The grant for such a franchise, even without consideration, is, unless a right to revoke is reserved, as effectual to vest an indefeasible title in the grantee as a voluntary conveyance of a piece of land. Not so, however, as to an exemption from taxation or from the exercise of the police power. It is property only granted on a consideration, and if granted without consideration, may be recalled. Doubtless such exemptions, if attached to property itself, would increase its value; but because they are against common right they will be construed to be personal, and limited to the grantee, unless a contrary intention clearly appears."

See, also, Memphis Ry. Co. v. Commissioners, 112 U. S. 609; Gulf Ry. Co. v. Hewes, 183 U. S. 66; Memphis v. Ins. Co., 91 Tenn. 566; Home Ins. Co. v. Tenn., 161 U. S. 198; Ry. Co. v. Comm., 97 Ky. 162; Ry. Co. v. Barry, 44 Ark. 17; an extended note in 35 Am. St. R. 390; 12 Am. & Eng. Ency. Law 298, and cases cited.

3. But there is still another and stronger reason why an irrevocable contract right did not pass to

the companies succeeding to the rights of the Minnesota Company. The contract, whatever may be its interpretation as between the territory and the original company, was entered into in 1857. Thereafter, in May, 1858, the territory was admitted to the union as a state. The foreclosure of the Minnesota and Pacific mortgage, from and through which the alleged immunity came, if at all, to defendant, occurred after the state was so admitted. Without stopping to consider the question whether there was a complete merger of the territorial exemption when the state became the purchaser and owner of the property, rights, and privileges of the company at the foreclosure sale, in so far as that exemption related to the earnings tax, treating it, as we must, independently of the land grant exemption, the further question whether the state could then grant a special privilege of this kind is answered in the negative by the positive terms of the Constitution on the subject of taxation. The Constitution then expressly provided, (Sec. 1, Article 9), that "all taxes to be raised in this state shall be as nearly equal as may be, and all property on which taxes are to be levied shall have a cash valuation, and be equalized and uniform throughout the state." The following section specifically limited the right of exemption and did not include exemptions of the character here involved nor authorize an earnings tax in lieu of all other taxes. This clearly precluded the state legislature from providing this form of taxation, by the revival of an old grant or otherwise, or from extending to any person or corporation an

exemption from general taxation in consideration of the payment of an earnings tax. Nor could it create a corporation with the right to receive or hold a special privilege of this sort. This would seem too clear under the authorities to admit of serious argument. It is supported, not only on principle, but by courts of high standing. Trask v. McGuire, 85 U. S. 391. In that case the court in the course of the opinion said:

> "The act under which the sale was made provided that the purchasers of the road should have all the rights, franchises, privileges and immunities which were enjoyed by the defaulting company under its charter and laws amendatory thereof, subject to the limitations and conditions therein contained, and not inconsistent with the act authorizing the sale. The new company thus acquired all the immunity from taxation which the original company originally possessed, if it were competent for the legislature at the time under the new Constitution, to confer this privilege. The question, therefore, is whether the legislature was competent to grant the immunity claimed under that Constitution, which went into operation on the 4th of July, 1865, previous to the passage of any of the Acts authorizing the proceedings under which the new company acquired its rights. * * * The inhibition of the Constitution applies in all its force against the renewal of an exemption equally as against its original creation; and this inhibition the legislature could not disregard in providing for the sale of the property which it had purchased."

In Keokuk Ry. Co. v. Mo., 152 U. S. 301, the court in the following language reiterated the same doctrine:

> "But the decisive answer to this objection is that the Legislature had no power, in 1869, to

extend to a new corporation created by the consolidation, an exemption contained in an act passed in 1857, before the constitution was adopted, and hence that, under the terms of this act, we cannot hold that immunity from taxation passed as a franchise or privilege to the consolidated corporation. The construction claimed by the defendant would be directly in the teeth of the constitutional provision that no property shall be exempted from taxation. While, as heretofore observed, an exemption from taxation contained in a charter previously granted could not be taken away by this constitutional provision without the impairment of the obligation of a contract, it doubtless applies to all corporations thereafter formed either by original charter or by the consolidation of prior corporations under the act of 1869."

It was reaffirmed in Rochester Ry. Co. v. Rochester, 205 U. S. 236, and again in Yazoo Ry. Co. v. Vicksburg, 209 U. S. 358.

We are speaking now of the earnings system of taxation inaugurated by the Minnesota and Pacific charter, and not with reference to the specific exemption of the land grant. For, as already pointed out, the provisions of the charter on the subject of the earnings tax and those in reference to the land grant exemption are separate and independent. As to the latter, the exemption being as to specific property delivered to the railroad company for a special purpose which would have been practically valueless without the exemption, (County of Nobles v. Ry. Co., 26 Minn. 294), and received by the company in consideration in part at least, of the exemption, was an exemption of the land and not of the corporation. It follows, therefore, that an irrevocable

right to the gross earnings system of taxation at an unchangeable rate did not pass from the state when it conferred upon the immediate successors of the original company all "the property, rights, privileges, franchises and immunities" of that company, which it acquired on the foreclosure. Nor was one created by the acts of the state legislature in 1865, by which the original charter provisions on the subject were modified. Chaps. 6 and 9, Sp. Laws 1865. The legislature of the state was prohibited by the express mandate of the Constitution, from granting such an immunity. All statutes therefore by which an attempt was made to confer the immunity upon defendant's predecessors in interest were unconstitutional and void. State *ex rel.* v. Stearns, 72 Minn. 200.

4. There is, however, another feature of the controversy which fully sustains the right of the state to increase the gross earnings tax. About the year 1869 an agitation was commenced on the subject of railroad taxation which has since then almost continuously, in one form or another, been either before the legislature or the courts of the state. This did not, until the act under consideration was passed, involve the gross earnings system or the rate thereof, but was directed to efforts to separate the land grant of this and other land grant roads for the purposes of taxation in addition to the earnings tax. This we held in the Parcher case, *supra*, and other subsequent cases, could not be done. But the earlier agitation led to the amendment of the Constitution in 1871, by which Sec. 32a of Article

4 was added to that instrument. That amendment, as held in the Stearns case, *supra*, in effect validated prior legislation inaugurating this form of taxation as to railroad companies, and all acts conferring the privilege to so discharge their obligations in respect to taxation. But coupled therewith was the reserved right on the part of the state to repeal or amend the same, provided the proposed amendment be ratified by the electors. Upon that amendment to the Constitution then, the validity of which has never been challenged, rests the inauguration of a valid earnings system of railroad taxation in this state; but no irrevocable contract right was thereby granted or became vested in the railroad companies. The power to amend, within reasonable limitations, still remained in the state, under which the act under consideration is valid. It simply increased the rate from three to four per cent., and no claim is made that, if the power of amendment exists, as compared with the rate imposed upon other taxpayers, it is unreasonable or unfair to the railroad companies. This power of amendment was expressly recognized and affirmed by the Supreme Court of the United States on a review of the case of State *ex rel* v. Stearns, *supra*. (Stearns v. State, 179 U. S. 223.) Mr. Justice Brewer, speaking for the court with reference to this amendment to our Constitution, said:

> "Confessedly after that amendment there existed a binding contract between the state and the railroad companies, by which the taxes on all their property were to be commuted and discharged on the payment of three per cent.

> of the gross earnings. If nothing had since occurred, that contract, under the decision of the Supreme Court, would continue exempting lands not used, as well as lands used for railroad purposes, from any other taxation than that which was expressed by three per cent. on the gross earnings of the companies. In other words, so far as the railroad companies are concerned, that constitutional amendment did away with the restrictive features of Sections 1 and 3 of Article 9 in the state constitution, and permitted and endorsed a peculiar method of taxation of railroad companies. The constitutional amendment of 1871 forbade any change by repeal or amendment of laws respecting the taxation of railroad companies except upon a vote of the people. The converse of that proposition may be accepted, to-wit: that by a vote of the people the tax provision concerning railroads might be repealed or amended. But is there no limitation upon the power of amendment?"

The court then proceeded to hold that an amendment which attempted to separate the land grant for the purposes of ordinary taxation, still retaining and enforcing the earnings rate in full, was unreasonable, saying that

> "a contractual exemption of the property of the railroad company in whole, upon consideration of a certain payment, cannot be changed by the state so as to continue the obligation in full, and at the same time deny to the company, either in whole or in part, the exemption conferred by the contract."

The argument of counsel for defendant that the purpose and object of this amendment to the Constitution was to prevent any decrease in the rate or any change in the method without the consent of

the people is not sound. Nor is there anything in the opinion in State v. Luther, 56 Minn. 156, to sustain that view. On the contrary, the court by the supplemental opinion refrained from expressing any opinion upon the question whether the power of amendment remained in the state.

If our views upon this branch of the case are sound, and of their correctness we are firmly convinced, it follows that the statute increasing the earnings tax to four per cent. is valid as to all lines owned and operated by defendant, whether authorized or contemplated by the old Minnesota and Pacific charter, or by subsequent legislation. We so hold.

5. But it is urged that the conclusions here announced are in conflict with prior adjudications of this court, upon which reliance is had to sustain the claim that an irrevocable contract for a three per cent. rate was created by the Minnesota and Pacific charter which passed to and became vested in defendant. Attention is called in support of this contention to Ry. Co. v. Parcher, 14 Minn. 297; State v. Ry. Co., 32 Minn. 294; County of Stevens v. Ry. Co., 36 Minn. 467; County of Traverse v. Ry. Co., 73 Minn. 417; State v. Luther, 56 Minn. 156; Ry. Co. v. Pfaender, 23 Minn. 217; State v. Ry. Co., 30 Minn. 311; County of Todd v. Ry. Co., 38 Minn. 163, and other similar cases. But an examination of each demonstrates that the question here presented was in no way involved. The Parcher case involved the right of the state to tax the land grant in addition to enforcing the earnings tax, and while

the court discussed at some length the contractual relations arising from the Minnesota and Pacific charter, it finally reached the pivotal question before it and held that the specific exemption of the land was valid, and upon that conclusion based its decision. The result of that decision is in full harmony with the view that the exemption of specific property donated to the railroad company for a specific purpose attached to the land, and was not, like the earnings system, a personal privilege to the grantee. The Pfaender case involved solely the question whether the railroad was liable for a two or a three per cent. tax on its earnings. The case of State v. Ry. Co., 21 Minn. 315, again presented the taxability of the land grant, and the decision was placed squarely upon the clause of the charter of May 22, 1857, which is therein quoted, that the lands granted by the state "shall be and are exempted from all taxation until the same shall have been sold and conveyed." The other cases also involved solely this specific exemption. The question whether the provisions of the charter respecting the gross earnings tax constituted an irrevocable contract was not before the court in either of the older cases and a consideration thereof was wholly unnecessary to the result reached. Such appears to have been the view of Mr. Justice White, (with whom concurred Justices Harlan, Gray and McKenna), in Stearns v. State, 179 U. S., supra, for he there said:

> "Nor does it seem to me that the decisions of the Minnesota courts, which are referred to as

showing that under the Constitution of that state it was competent for the legislature to enact a gross receipt tax law and provide for its continuance by an irrepealable contract, sustain the proposition deduced from them. In no single one of these cases was the question of irrepealable contract presented, considered, or decided in any form."

What was said in the opinion in State v. Ry. Co., 21 Minn. 315, in reference to the case of Trask v. McGuire, *supra*, should be given no greater force or effect than the decision of a question now claimed to have been determined but which was not before the court. The taxation of the land grant was also involved in County of Nobles v. Ry. Co., 26 Minn. 294; County of Stevens v. Ry. Co., 36 Minn. 467; County of Todd v. Ry. Co., 38 Minn. 163; and in Traverse County v. Ry. Co., 73 Minn. 417. In the last case cited the court again took occasion to say, and correctly so, that "the question whether the legislation on the subject involves the elements of a contract between the defendant or its predecessors and the state, is not necessarily involved, and need not now be considered."

Yet that case, and the Luther case *were* where substantially the same statement was made, were for all practical purposes identical with the other cases referred to where the question received elaborate attention. State v. Ry. Co., 30 Minn. 311; State v. Ry. Co., 32 Minn. 294, involved only the construction of the phrase "gross earnings," and what earnings came within its meaning. Prior to the statute construed in State *ex rel* v. Stearns,

supra, no attempt had been made by the legislature to amend or modify this system of taxation, and the act involved in the case at bar was the first attempt to increase the rate. In that case, as already pointed out, there was a legislative attempt, based on the constitutional amendment of 1871, separately to tax the lands of the company in addition to the gross earnings tax. This the Supreme Court of the United States held unreasonable.

In view of this situation it cannot be urged with any force that the earlier decisions of the court rightly adjudicated or determined the question of the power of the state to change the rate. The question not being involved in the prior cases, former expressions of the court were *obiter* and of no binding force or effect as final adjudications. What was said therein is confessedly at variance with the conclusions of nearly all other courts, state and federal, and inasmuch as the precise question was not necessarily there before the court, we are fully justified in declining to treat them as final.

Much has been written and said on the subject of the rule of *stare decisis* and of the importance, in the interests of certainty in the law, of following and applying previous decisions in cases involving the same facts. The rule which requires this is a wholesome one and would not minimize it in the least in the present case. It has its limitations, however, and applies only in those cases where the facts and issues presented are for practical purposes the same. It does not apply to expressions

of opinion upon, or even decisions of, questions not necessary to the ascertainment of the rights of the parties in the pending litigation. When the court goes beyond the precise issues and expresses views or opinions upon questions not necessarily before it, the views so expressed will be respected, but cannot arbitrarily control a subsequent case where the very point is squarely presented. The reason is obvious. A question actually before the court is investigated in all its phases with deliberation and care, and though other questions may be discussed and apt principles of law declared by way of illustration, their possible bearing on future cases is seldom fully considered. 26 Am. & Eng. Ency. Law, 168, and cases cited; Cohens v. Virginia, 6 Wheat. 339. And in the case at bar, the validity of the land grant exemption was alone presented in nearly all the previous cases upon which defendant relies. While the court there considered and discussed the gross earnings provisions of the charter, a situation like that now before us was not investigated, considered or attempted to be determined. The language of Chancellor Kent, page 477 of his Commentaries, is appropriate and apt in connection with this feature of the case:

> "But I wish not to be understood to press too strongly the doctrine of *stare decisis*, when I recollect that there are more than one thousand cases to be pointed out in the English and American books of report which have been overruled, doubted, or limited in their application. It is probable that the record of many of the courts in this country are replete with hasty and crude decisions; and such cases ought to be

> examined without fear, and revised without reluctance, rather than to have the character of our law impaired, and the beauty and harmony of the system destroyed by the perpetuity of error. Even a series of decisions are not always conclusive evidence of what is law; and the revision of a decision very often resolves itself into a mere quetsion of expediency depending upon the consideration of the importance of certainty in the rule, and the extent of property to be affected by a change of it."

The Supreme Court of Mississippi in Adams v. Yazoo Ry. Co., 77 Miss. 194, a case involving a situation quite analogous to the case at bar, and where the court was confronted with prior decisions in conflict with the conclusion reached in the case then before it, said:

> "We have all proper respect for the doctrine of *stare decisis*, but it is a doctrine not inflexible, and departed from over and over by the wisest courts in proper cases. If the doctrine of *stare decisis* can be disregarded in proper cases, where the question is one merely of property rights between individuals, how much stronger is the reason for disregarding it when so to do results, as here, in restoring to a sovereign state the right to tax corporations and make them bear their just share of the burdens of that government whose protection they so constantly and persistently invoke."

See also, 26 Am. & Eng. Ency. Law, 163; Boyd v. Alabama, 94 U. S. 59; Cromwell v. County, 94 U. S. 351; Bradshaw v. Mill Co., 52 Minn. 59; High v. Shoemaker, 22 Cal. 302; Cohens v. Virginia, 6 Wheat. 399.

Our conclusions therefore are that defendant has no irrepealable contract on the subject of its taxa-

tion, that the statute increasing the rate of the gross earnings tax to four per cent. thus making a uniform rate as to all railroads of the state, impairs none of its contractual or other vested rights, that it is valid, and the state is entitled to judgment accordingly. The judgment of the trial court is therefore reversed on the state's appeal, affirmed as to defendant's appeal, and final judgment ordered to be entered in this court in favor of the state for the amount claimed in the complaint.

BROWN, J.

Trans. p. 345 et seq.